Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-448

DELTA AIR LINES, INC., ET AL., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 1977

TABLE OF APPENDICES

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1241

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT *
WESTERN AIR LINES, INC.
NORTHWEST AIRLINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC., INTERVENORS

No. 76-1309

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
WESTERN AIR LINES, INC.
NORTHWEST AIRLINES, INC., INTERVENORS

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* In order to distinguish this case from others of the same name, readers are encouraged to cite it as: *Delta Air Lines v. CAB* [Miami-Los Angeles route].

No. 76-1429

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
WESTERN AIR LINES, INC.
PAN AMERICAN WORLD AIRWAYS, INC.
NORTHWEST AIRLINES, INC., INTERVENORS

No. 76-1602

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
PAN AMERICAN WORLD AIRWAYS, INC.
WESTERN AIR LINES, INC., INTERVENORS

Petitions for Review of Order of
the Civil Aeronautics Board

Argued September 23, 1976

Decided June 23, 1977

Robert Reed Gray, with whom *James W. Callison* and *Louis Hayner Kurrelmeyer* were on the brief, for petitioner in No. 76-1241.

James F. Bell, with whom *Richard D. Mathias* and *Joseph M. Oliver, Jr.* were on the brief, for petitioner in No. 76-1309 also entered appearances for intervenor, Pan American World Airways, Inc.

Bert W. Rein, with whom *Jon Paugh* and *Edwin O. Bailey* were on the brief, for petitioner in No. 76-1429.

J. William Doolittle, Jr., for petitioner in No. 76-1602. *Alfred V. J. Prather, Ky P. Ewing, Jr.* and *Carl B. Nelson, Jr.*, were on the brief for petitioner in No. 76-1602.

Alan R. Demby, Attorney, Civil Aeronautics Board, with whom *James C. Schultz*, General Counsel, *Jerome Nelson*, Deputy General Counsel, *Glen M. Bendixsen*, Associate General Counsel, *Robert L. Toomey, Thomas L. Ray*, Attorneys, Civil Aeronautics Board, *Carl D. Lawson* and *Lee I. Weintraub*, Attorneys, Department of Justice, were on the brief, for respondent. *B. Barry Grossman, Edward E. Lawson*, Attorneys, Department of Justice, and *Michael Stempler*, Attorney, Civil Aeronautics Board, also entered appearances for respondent.

Emory N. Ellis, Jr., with whom *Gerald P. O'Grady* was on the brief, for intervenor, Western Air Lines, Inc.

Ronald D. Eastman entered an appearance for intervenor, Northwest Airlines, Inc.

Before MCGOWAN, LEVENTHAL and ROBB, *Circuit Judges*.

MCGOWAN, *Circuit Judge*: These consolidated cases present the first occasion for judicial review of a matter which has already occupied the attention of the Civil Aeronautics Board for nearly ten years—the award of competitive nonstop authority on the Miami-Los Angeles route. Of the various contentions pressed upon us by the several contending parties, only three warrant discussion in some detail:

1. The claim by Delta Air Lines, Inc., that it was entitled to priority by reason of its 1972 merger with Northeast Airlines, Inc.

2. The challenge by National Airlines, Inc., the incumbent monopoly carrier on the route, to the Board's alleged failure to comply with the Energy Policy and Conservation Act of 1975.

3. The contention (echoed by National) of Pan American World Airways, Inc., the carrier recommended for the route by the Administrative Law Judge but displaced at the Board level by Western Air Lines, Inc., that the Board unfairly took into account events occurring during the three-year interval between the closing of the record and the Board's decision.

We find no basis in either of the first two for disturbing the Board's action. The third, however, presents procedural problems which cause us to conclude that the case should be remanded to the Board for reconsideration after opportunity is afforded for adversarial inquiry into matters occurring after the closing of the record in 1973.

I

On March 10, 1967 the Board initiated the Southern Tier Competitive Nonstop Investigation. The Miami-Los Angeles route was among the eighteen markets under consideration in that proceeding. Single carrier nonstop service between the two cities had originally been authorized in the Southern Transcontinental Service Case, 33 C.A.B. 701 (1961) (*see also* 14 C.F.R. § 202.11 (1976)), and from 1961 until 1969 National enjoyed monopoly certification over the route.

The Board, in July, 1969, awarded competitive nonstop authority in the Miami-Los Angeles market to Northeast Airlines, Inc. "for route strengthening purposes." On petition for reconsideration, Eastern Airlines, Inc.,

a competing applicant, suggested that, given Northeast's comparatively weak financial posture, Northeast might be a likely candidate for a merger, and that, under such circumstances, the Board's solicitude for the welfare of Northeast's route structure might be ill-advised. In response, Northeast categorically assured the Board that no merger was contemplated. Apparently in reliance on this representation, the Board, without discussion, affirmed its award to Northeast in an order issued September 18, 1969. Six days later, Northeast decided to seek a merger. Meanwhile, on October 1, 1969, Northeast commenced nonstop service under its new authority.

Northeast's first prospective merger partner was Northwest Airlines, Inc. In August, 1970, after a public hearing, the Board's Examiner recommended that the proposed merger be approved, and that all of Northeast's certificates, including that which covered the Miami-Los Angeles route, be transferred to Northwest. The Examiner reached this result over the objections of Delta and another carrier, and despite his recognition that Miami-Los Angeles authority had only been granted to Northeast in an effort to counterbalance existing limitations in Northeast's route system. The Board itself was not quite so accommodating in its review of the proposed merger. Although conceding that the transaction would prove economically beneficial to both parties, and would entail no monopoly dangers, a three-member majority of the Board was unwilling to accept transfer of the Miami-Los Angeles authority without an opportunity to reconsider the route award in the light of post-merger circumstances. The December, 1970 order accompanying the Board's opinion approved the merger subject to the conditions

> (a) that the authorization of Northwest Airlines to operate segment 7 of Northeast's certificate for Route 27 (Miami-Los Angeles) be stayed pending final decision in a proceeding for the purpose of reexamination of such authorization to be instituted upon

transfer of the certificate, and (b) that the transferred certificate for Route 27 shall be subject to whatever determinations are made regarding segment 7 in such proceeding . . . .

Some of the Board's pertinent remarks are set forth in the margin.[1]

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[1] The Board is fully aware that Northwest may withdraw from the merger unless it receives the Miami-Los Angeles route outright. Nonetheless, the Board has reluctantly concluded that the public interest and the integrity of the Board processes can be vindicated only if the Board retains the power to reconsider that route award in later section 401(g) proceedings. Otherwise, we would find that the merger would be inconsistent with the public interest. Thus, the Board finds itself compelled to stay the authorization for Northwest to operate the Miami-Los Angeles route pending completion of the subsequent proceedings.

. . . .

Acceptance of the examiner's view can only encourage the formulation of merger plans, intentionally or otherwise, based upon the outcome of pending route proceedings. In order to avoid that result, the Board believes that it must reexamine the pre-merger route award in the light of the circumstances as they exist following the merger.

The Board hopes that Northwest will reconsider its threat to withdraw from the merger if the Miami-Los Angeles route is stayed. The Board has not rejected Northwest's claim to the route; it has simply concluded that the question must be decided in a new evidentiary proceeding. If Northwest consummates the merger, it will have full opportunity in the section 401(g) proceeding to justify its retention of the route. In this connection, Northwest will be free to argue that (as the examiner concluded) the Northeast system should be regarded as an integrated whole, with the profitable routes needed to offset the marginal ones. And Northwest can repeat its assertions that the Miami-Los Angeles route integrates well with its present authority beyond California to Hawaii and the Orient.

Northwest petitioned for reconsideration, but, in an opinion dated March, 1971, the Board remained steadfast in its refusal to permit transfer of the Miami-Los Angeles route. One factor influential in stiffening the Board's resolve was Delta's expressed willingness to merge with Northeast "*whether or not* the Miami-Los Angeles segment is transferred to Delta as part of the merger." Rather than proceed in accordance with the restrictions imposed by the Board, Northwest withdrew from the prospective merger. In May, 1971, Northeast and Delta entered into a merger agreement, and another hearing was held by the Board; and, in October, 1971, the Examiner recommended that the merger be approved subject to certain conditions, including a stay of authority to operate the Miami-Los Angeles route pending completion of a section 401(g) proceeding.[2] With minor variations not relevant here, the Board in May of 1972 concurred in the Examiner's recommendations. The language in that order referring to the Board's treatment of the Miami-Los Angeles route was essentially identical to that employed on the same subject in connection with the proposed Northwest merger. *See* text accompanying note 1 *supra*. Petitions for reconsideration raising issues unrelated to the present controversy were denied, and the Delta-Northeast merger finally approved, in July, 1972.

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[2] Section 401(g) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1371(g) (1970), provides, in pertinent part:

> The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate . . . .

On July 31, Northeast terminated its Miami-Los Angeles service, and National once again became a monopoly carrier between the two cities.

Approximately three weeks later, the Board, honoring its commitment to undertake a post-merger reevaluation of the Miami-Los Angeles market, instituted an investigation designated as the *Miami-Los Angeles Competitive Nonstop Case*. The stated purpose of this investigation was

> to determine whether the public convenience and necessity require (a) the alteration, amendment, or modification of any carrier certificates so as to authorize nonstop service . . . between Miami-Fort Lauderdale, Fla., and Los Angeles-Ontario-Long Beach, Calif., and (b) the alteration, amendment, or modification of Delta Air Lines' certificate for route 27 so as to suspend, terminate, or otherwise modify authority to operate over segment 7.

An expedited hearing was scheduled, and on June 13, 1973, the ALJ issued his decision, finding a continuing need for nonstop competition on the Miami-Los Angeles route, and authorizing Pan American to provide the necessary service. On June 19, 1973, the Board, on its own initiative, granted discretionary review of the ALJ's determination.

The first delay encountered was precipitated by National's contention that certification of a nonstop competitive carrier "would constitute a major Federal action significantly affecting the quality of the environment," and would therefore require a detailed environmental statement under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970). The ALJ rejected this position, and the Board purportedly followed suit in an order dated September 27, 1973. However, despite its belief that further formal exploration of environmental questions was not statutorily required, the

Board announced its intention to accord such matters a thorough airing, and therefore instructed the Director of the Board's Bureau of Operating Rights "to prepare a statement with respect to the environment for consideration and comment by the parties, other environmentally concerned Federal agencies, and other interested persons." A preliminary draft of this environmental assessment was not completed until August, 1974, and the final version did not become available until the following December. Meanwhile, all other proceedings in the *Miami-Los Angeles Competitive Nonstop Case* were deferred pending completion of the environmental study. The Bureau's ultimate conclusion matched that reached eighteen months earlier by the ALJ, namely, that

> the award of a certificate of public convenience and necessity authorizing nonstop air transportation between Miami-Ft. Lauderdale and Los Angeles-Ontario-Long Beach to one of the nine applicants, and the commencement of operations by the carrier selected, would not constitute a "major Federal action significantly affecting quality of the human environment" within the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969.

J.A. 717. No party has challenged this conclusion before either the Board or this court.[3]

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[3] For a detailed treatment of the NEPA aspect of the Miami-Los Angeles route proceeding, *see* Burger, Miami-Los Angeles and NEPA: The Use of the National Environmental Policy Act of 1969 as an Anticompetitive Weapon, 42 J. Air L. & Com. 529 (1976). The author observes that *economic* regulatory agencies such as the CAB generally lack the technical expertise necessary for the analysis of environmental issues, and that the difficulties are compounded when such analysis must take place in the context of a licensing proceeding. In the aftermath of the lengthy delay occasioned by NEPA considerations in the Miami-Los Angeles case, the CAB has adopted a set of regulations, instituting a regularized NEPA compliance system. *See id.* at 567-73; 40 Fed. Reg. 37,184-203 (1975); and 14 C.F.R. Part 312 (1976).

Oral argument was finally heard by the Board on April 16, 1975. Eleven months passed before the Board, on March 15, 1976, issued its decision, affirming the ALJ's finding of a need for competition on the Miami-Los Angeles route, but reversing his award of operating authority to Pan American, and certifying Western instead. At the same time, the Board denied a January, 1976 motion by National to postpone further action until after preparation of a statement under the EPCA estimating "the probable impact on energy efficiency and energy conservation of nonstop competitive authority in the Miami-Los Angeles market." Also denied in March, 1976 was a November, 1974 motion by Continental to reopen the record on the ground that changes in circumstances occurring since the close of economic hearings undermined the evidentiary basis for the ALJ's selection of Pan American, and made profitable operation of the Miami-Los Angeles route by Pan American unlikely.

Pan American had opposed the motions of both National and Continental. However, on the morning of March 15, 1976, only hours before the Board's decision was released, Pan American itself filed a motion to reopen the record for further evidentiary presentations. This motion to reopen was denied, and, on June 16, the Board promulgated an order rejecting various petitions for reconsideration and denying requests for a stay of the award pending judicial review. Such a stay was similarly denied by a motions panel of this court on July 2, 1976, but with directions for expedited hearing on the merits.

II

Delta has attempted to persuade us of its entitlement to preferential treatment. Unimpressed by any of the theories advanced, and convinced that Delta had agreed, as one of the conditions of Board approval of the Delta-Northeast merger, to compete on an equal footing with

other applicants for Miami-Los Angeles authority, we affirm the Board in its rejection of Delta's claims to special status.

During the Examiner's review of the proposed Northwest-Northeast merger in 1970, Delta urged that, whatever the Board's conclusion as to the overall advisability of the merger, in no event should the Miami-Los Angeles segment of Northeast's Route 27 be transferred to Northwest as part of the deal.[4] Criticizing what it characterized as Northeast's "emotional plea" for route strengthening in the Southern Tier investigation, the success of which was followed immediately by Northeast's initiation of merger negotiations, Delta argued that, if transfer of Miami-Los Angeles authority were permitted, other financially weak carriers would be encouraged to seek route awards for use as merger "bait." Technical problems with respect to effectuating the nontransfer could be solved, Delta suggested, by inclusion of the following statement in the Board's order concerning the proposed merger:

> Segment 7 of Northeast's Route 27 shall not be transferred to the surviving carrier. . . . [T]he actual amendment of the certificate for Route 27 to incorporate the restriction specified above cannot be accomplished until the outcome of a Section 401 (g) proceeding to alter, amend, or modify the certificate with respect to the above-certificated au-

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[4] Apparently, CAB grants of additional operating authority are ordinarily implemented through the tacking of a new segment, embodying the newly-awarded route, onto an existing route certificate held by the carrier and involving at least one of the terminal points of the new route. *See* CAB Brief at 76 n.37 and 80 n.39. While the reason for this practice has not been explained to us, we cannot discern any indication in the record that the Board has deliberately employed this device to facilitate subsequent route structure manipulation, and to permit evasion of statutory procedural requirements.

> thority. At the time of the transfer of the certificate for Route 27 to Northwest, however, we will stay those portions of Northeast's certificated authorizations which we have found would be inconsistent with the public interest to transfer to Northwest.

This language, although somewhat opaque, appears to contemplate transfer of the entire Route 27 certificate to Northwest, accompanied by an annotation to the effect that segment 7 itself would *not* be transferred and that authority to operate segment 7 would be stayed pending completion of the described § 401(g) proceeding.

The actual wording adopted by the Board (see text accompanying note 1 *supra*) omitted any express declaration that segment 7 would not be transferred. Nevertheless, the intention of the Board to proceed substantially in the manner proposed by Delta was clear. Equally clear was the fact that Delta fully appreciated the import of the Board's formulation. As noted previously, Delta, in opposition to Northwest's petition for reconsideration, sought to dispel potential Board fears that the perceived benefits of merger might be lost due to the conditions imposed by the Board. To this end, Delta announced its own desire to merge with Northeast "*whether or not* the Miami-Los Angeles segment is transferred to Delta as part of the merger." Moreover, Delta represented that, in the event the latter merger materialized, Delta would be "amenable to participating in a Section 401 proceeding vying for the [Miami-Los Angeles] authority along with other interested applicants."[5] In rejecting Northwest's petition, the Board declared its hope that Northwest

[5] At the same time, Delta purported to have detected in the Board's original opinion an implication that "if Northwest did go ahead with the merger on the basis stipulated, Northwest might have some advantage over the other applicants in the 401(g) proceeding . . . ." We find no such implication in our reading of the relevant portion of the Board's opinion.

would nevertheless proceed with the merger, but in no way suggested that, should the transaction go forward, Northwest would receive preferential treatment in the subsequent Miami-Los Angeles proceeding. Contrarily, the Board reminded Northwest of "the possibility of persuading the Board in the section 401(g) proceeding that the Miami-Los Angeles route should be permanently awarded to Northwest," but quickly cautioned that "[w]e intimate no views as to the outcome of that proceeding." Responding to a point raised by another carrier, the Board stated:

> Braniff expresses concern that the Board's opinion might be construed as limited to modifications of the Northeast permit, without considering applications by other carriers for such route authority under section 401(b) of the Act. It was not our intention to so confine the contemplated proceeding.[6]

Thus, in March, 1971, at the close of the Board's examination of the proposed Northeast-Northwest merger, Delta had no reason whatever to believe that Northwest could assert any special claim to Northeast's Miami-Los Angeles authority if that merger actually took place.

Nothing occurred in the course of the Board's investigation of the proposed Delta-Northeast merger that can justify Delta in the conclusion that, after merger, Delta's status regarding the Miami-Los Angeles route is different

[6] Subsections 401(a) and (b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1371(a), (b) (1970), provide:

> (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.
>
> (b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

from that which Northwest might have enjoyed had it pursued the Northeast deal to completion. Indeed, Delta has conceded on two separate occasions in its brief that the relevant conditions imposed by the Board on the Delta-Northeast merger are "in all significant respects identical to the conditions earlier imposed upon the Northwest-Northeast merger." Delta Brief at 15, 24.

Furthermore, during its consideration of the Delta-Northeast agreement, the Board plainly apprised Delta of the character of the planned proceeding on Miami-Los Angeles authority. First, in November, 1971, just a week after release of the Examiner's initial decision recommending approval of the Delta-Northeast merger subject to the restrictions outlined above, the Board issued an order in the Houston-Miami Phase of the *Southern Tier Competitive Nonstop Investigation.* Responding to this court's partial remand of the Board's original *Southern Tier* order (*see Continental Air Lines v. CAB*, 443 F.2d 745 (D.C. Cir 1971)), the Board directed that further evidentiary hearings be held on an expedited basis "on the issue of whether the public convenience and necessity require competitive nonstop service between Houston and Miami, and which carrier or carriers, if any, should be selected for such authority." In a footnote, the Board announced that it

> reserve[d] the right at a later time to consolidate into the present proceeding the issue of competitive nonstop service in the closely related Miami-Los Angeles market, in the event that we approve the pending merger agreement between Delta and Northeast Airlines but find that the public interest requires that we stay the transfer of Northeast's Miami-Los Angeles route, also granted in the *Southern Tier* case, pending a section 401(g) proceeding *to determine whether the route should be so transferred, should be awarded to a different applicant, or should be allowed to lapse.* (Emphasis added.)

This description of the issues which might be considered in a proceeding subsequent to conditional approval of the Delta-Northeast merger was removed from the realm of speculation and formally repeated by the Board in its April, 1972 order and opinion ruling on the Delta merger. When proceedings in the current docket were instituted, the Board specifically identified the possibility that authority to operate the Miami-Los Angeles route would be deleted from the certificate transferred from Northeast to Delta. *See* text at 3 *supra.* At no point in all this did the Board even remotely suggest that, if Delta executed the merger with Northeast, Delta could expect primary ranking among applicants for Miami-Los Angeles authority.

Despite the foregoing, Delta has advanced a two-pronged argument drawn from the language of § 401(g) (see note 2 *supra*) and supposedly supporting Delta's claim to a preferred position.[7] First, the carrier maintains that, regardless of the segment 7 designation employed by the Board in 1969 when appending Miami-Los Angeles authority to Northeast's existing Route 27 certificate, the award of such authority in reality constituted the grant of a new and separate certificate which, whether held by Northeast or Delta, could not be revoked absent a showing of "intentional failure to comply" with applicable statutes, rules, or regulations. Secondly, Delta contends that the Board's power under § 401(g) to alter, amend, or modify airline certificates has not historically been exercised to eliminate an entire major route over carrier objection, and that, even if the Board's power does extend far enough to permit such a termination, the requisite "public convenience and necessity" finding was not and could not have been made in this case.

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[7] In the absence of such an entitlement, Delta does not quarrel with the Board's finding that the selection of Western for the Miami-Los Angeles route will produce greater public benefits than the selection of Delta.

We reject both parts of Delta's argument for essentially the same reason. The *Miami-Los Angeles Competitive Nonstop Case* was not an ordinary § 401(g) proceeding. Rather, it was convened in accordance with the Board's decision in the Delta-Northeast merger case. The Board's order instituting the Miami-Los Angeles investigation relied specifically not only on § 401(g), but also on § 408(b) of the Federal Aviation Act, 49 U.S.C. § 1378(b) (1970). The latter provision states that

> Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, *upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe* . . . .

(Emphasis added.)

The factual context in which the Delta-Northeast merger occurred plainly demonstrates that Board approval was conditioned upon a stay of authority to operate the Miami-Los Angeles route, pending a fresh assessment of the need for competition in the Miami-Los Angeles market and of the relative merits of the various applicants for authority to serve that market. Thus, we find it unnecessary to consider the propriety of the

Board's characterization of the Miami-Los Angeles route as a segment of a previously-existing certificate rather than as a new and separate certificate unto itself.[8]

Similarly, we need not evaluate Delta's contention that the Board's § 401(g) power to alter, amend, or modify certificates does not embrace the prerogative to eliminate an entire major route from a carrier's authority. Even if Delta's points were well taken with respect to § 401(g) proceedings generally, they completely ignore the fact that, under § 408(b), the Board may approve a merger "upon such terms and conditions as it shall find

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[8] On the other hand, we also express no opinion as to the correctness of the Board's interpretation of the term "certificate" as used in § 401(g). The Board insists that, properly read,

> the "certificate" to which Congress had reference in Section 401(g) is the carrier's overall operating authority rather than each of the particular routes awarded the carrier. . . . Any other interpretation of the Act would be entirely illogical, as some carriers' route authorizations are contained in one certificate while other carriers have a number of certificates covering one or more routes. Whether a carrier's route authorizations are contained in one or more documents turns upon such matters as historical accident, distinctions between authorizations which require Presidential approval and those which do not, and administrative convenience . . . .

While appealing in some respects, the Board's construction is surely not obligatory, and, in fact, directly contradicts the District Court's holding in Pan American World Airways v. Boyd, 207 F. Supp. 152, 158 (D.D.C. 1962), *rev'd on other grounds sub nom.* Alaska Airlines v. Pan American World Airways, 321 F.2d 394 (D.C. Cir. 1963). The Board asserts that the latter case is not "persuasive precedent," apparently for no reason other than that it did not conform to the prior position of the Board. Finding resolution of the issue unnecessary to our decision herein, we leave to another day the precise definition of "certificate" as used in § 401(g).

to be just and reasonable . . . ." [9] In this case, one of the terms imposed was a *de novo* consideration of the Miami-Los Angeles route award originally made to Northeast in 1969. If such a proceeding does not fall neatly within the mold of the ordinary § 401(g) proceeding, perhaps the Board should have been more circumspect about its use of the § 401(g) label. Since we can discern no obvious interrelationship between § 401(g) and § 408(b) in the statutory scheme of the Federal Aviation Act, we see no reason why the Board could not have omitted mention of § 401(g) altogether, and simply provided a brief description of the proceeding it proposed to conduct, pursuant to § 408(b), in connection with the Delta-Northeast merger.[10] While this may con-

[9] Delta's citation of the Supreme Court's stress on "route security" as an element of Congressional concern underlying § 401(g) is inapposite. No merger was involved in CAB v. Delta Air Lines, 367 U.S. 316 (1961), and, accordingly, no question of the Board's broad powers under § 408(b) arose in that case.

Likewise, Delta's reliance on Western Air Lines v. CAB, 495 F.2d 145 (D.C. Cir. 1974), is misplaced. Because the court in *Western* was dealing with a non-merger situation, its comments related solely to § 401(g) viewed independently of § 408(b). However, even accepting the court's language in *Western* at face value, we find no merit in Delta's position. In § 401(g), the court said, "[t]he Board was given the power to respond to changed economic conditions and redefinitions of 'the public convenience and necessity' by adjusting the operating authority of carriers." 495 F.2d at 156. Surely an important transaction like the merger of Delta and Northeast may present an appropriate occasion for a redefinition of "the public convenience and necessity" to which the Board may respond under § 401(g).

[10] The Board's dependence upon § 401(g) appears to be traceable to a footnote in the United-Capital Merger Case, 33 C.A.B. 307 (1961), *aff'd sub nom.* Northwest Airlines v. CAB, 303 F.2d 395 (D.C. Cir. 1962). The facts in that proceeding were significantly different from those now before

ceivably have been the preferable course for the Board to follow, its failure to do so did not prejudice Delta.

III

We turn now to National's contention that the Board has not produced the energy impact statement contem-

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us. Capital Airlines, Inc. was in dire financial straits. The Board found, and this court agreed, that Capital would not have survived if the merger with United had been disapproved. Two carriers, Delta and Eastern,

> requested that the Board condition approval of the merger on United's acceptance of the nontransfer of certain portions of Capital's route authority. . . . At the oral argument before the Board, Eastern proposed an alternative procedure; *i.e.*, that the Board approve the merger conditioned upon (1) the simultaneous institution of an investigation under section 401(g) of the Act to determine whether the alteration, amendment, modification, or suspension in whole or in part, of any or all of the certificates of public convenience and necessity of Capital is required by the public convenience and necessity; and (2) the maintenance of the *status quo* with respect to Capital's nonstop operations during the investigation.

The Board, concerned that any attempt to impose major route authority restrictions might jeopardize the impending merger, rejected both suggestions, and this court upheld that decision, on both practical and legal grounds. *See especially* 303 F.2d at 397-98, 400-01.

In the course of its opinion, the Board ventured the following aside, describing the mechanism by which Eastern's proposal could have been implemented, if its substance had been accepted by the Board:

> As a procedural matter, any withholding of Capital's route authority from United would have to be accomplished through staying the appropriate portions of the Capital certificates transferred to United and instituting a sec. 401(g) proceeding to alter, amend, modify, or suspend the portions of the certificates in question. While we could, within the scope of this proceeding, place limi-

plated by § 382(b) of the Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6362(b) (Supp. V 1976). Section 382(b) declares that five federal agencies, among them the CAB,

> shall, where practicable and consistent with the exercise of their authority under law, include in any major regulatory action (as defined by rule by each such agency) taken by each such agency, a statement of the probable impact of such major regulatory action on energy efficiency and energy conservation.

In considering the application of this language to the Miami-Los Angeles route case, a brief comparison with relevant portions of the National Environmental Policy Act of 1969 (NEPA) may prove useful. As indicated above, the Board's Bureau of Operating Rights concluded, after a lengthy investigation, that NEPA did not require a formal environmental impact statement (EIS) in connection with the current proceedings, and that finding has not been questioned by the parties. This background is especially significant in view of NEPA's relatively rigid statutory scheme. Although § 382(b) of EPCA is reminiscent of NEPA's EIS requirement, at least two distinctions between the statutes are immediately evident. First, the statement required by EPCA is not described in the detail which Congress employed in prescribing the content of a formal EIS under NEPA. Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C)

> tations upon United's use of the authority received by transfer to United, action upon the certificates themselves, to alter, or terminate, the routes involved would require a public convenience and necessity inquiry under sec. 401(g) of the Act.

33 C.A.B. at 318 n.52. The Board cited no authority for the proposition that certificates could not be amended, even in the merger context, without resort to a § 401(g) proceeding. The Board's power to impose merger conditions under § 408(b) was not discussed at this juncture.

[Continued]

(1970), lists five subjects which must be specifically treated in every such environmental statement, and also admonishes that no such statement shall be prepared prior to consultation with other appropriate federal agencies. Secondly, under EPCA, the affected agencies enjoy greater flexibility, not just because of the less-structured format of the energy impact statement, but also because of the incorporation of a statutory safety valve making such a statement mandatory only where "practicable and consistent" with the exercise of agency authority under existing law.

Preliminarily, we note an important administrative development occcurring since oral argument. On December 22, 1976, the Board published in the Federal Register proposed regulations implementing EPCA's command that the phrase "major regulatory action" be defined by each agency covered by Section 382.[11] 41 Fed. Reg. 56669-73 (1976) (to be codified in 14 C.F.R. § 313). We mention four salient features of these proposed regulations.

Although recognizing the arbitrary character of a quantitative standard (*see id.* at 56671), the Board, emphasizing ease of administration, has determined that

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[Continued]

However, the Board did find that unrestricted approval of the merger would result in excessive diversion from two carriers already partially supported by government subsidy, Allegheny and Mohawk. Therefore, the Board determined to make certain comparatively minor route adjustments in the authority transferred from Capital to United. Despite its earlier indication that § 401(g) proceedings would have been required in connection with the restrictions proposed by Eastern and Delta, the Board accomplished the modifications it deemed desirable in a rather informal fashion with no mention of § 401(g).

[11] Before taking final action on the proposed regulations, the Board will consider all comments received by February 14, 1977.

particular conduct should qualify as "major regulatory action" if it

> [m]ay cause a near-term net annual change in aircraft fuel consumption of 10 million (10,000,000) gallons or more, compared to the probable consumption of fuel were the action not to be taken;

or if it is "specifically so designated by the Board." [12] We observe in passing that the Board's Bureau of Operating Rights has calculated that, on an annual basis, Western's twice daily nonstop round-trip service between Miami and Los Angeles would consume 16.5 million gallons of fuel.

The second noteworthy aspect of the Board's proposed regulations is their extremely imprecise definition of "energy efficiency" as that term is used in § 382(b) of EPCA. If finally enacted, § 313.3(b) of the regulations would provide that

> "Energy efficiency" means the ratio of the useful output of services in air transportation to the energy consumption of such services.

In commenting upon this proposed definition, the Board has sketched a variety of methods for measuring fuel efficiency, and has suggested, on the basis of recent experience, that none constitutes an entirely satisfactory approach under all circumstances. Therefore, the Board has declined "to be more specific or to render the definition in quantifiable terms at this time." Highly relevant in the present context are the Board's remarks with re-

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[12] The ten million gallon figure represents approximately one-tenth of one percent of

> certificated route carriers' total consumption of aviation gasoline and jet fuel in calendar year 1972, which is the last full year not reflecting the effects of the Arab oil embargo and OPEC price escalation, and the resultant petroleum conservation measures.

41 Fed. Reg. at 56671 (footnote omitted).

spect to the difficulties encountered in the use of comparative load factors as a means for assessing the impact of Board actions on energy efficiency:

> [S]ome Board actions which on their face may be perceived to have detrimental impact on energy efficiency in the short run may in fact be intrinsically neutral or even beneficial. An example, in our view, is the certification of first competitive service. Historically, load factors in competitive markets have on the whole been lower than in monopoly markets. Moreover, it is generally—although not universally—the case that one consequence of the certification of a competitor in a monopoly market is to depress load factors in the short term, since neither normal traffic growth nor the new traffic often stimulated by new service is usually able to absorb the additional capacity introduced in the market in the first year of operations. In such an instance, it would appear that energy efficiency has suffered. However, over time there is no intrinsic reason why, at any given fare level, a competitive market cannot reach an equilibrium of demand and supply whereby market load factor returns to a reasonable level. *Thus, reliance on forecast year comparisons of fuel efficiency may well be meaningless or even substantially misleading in the typical competitive route case.*

Id. at 56672 (emphasis added).

Thirdly, the proposed regulations, together with the Board's explanatory statement, demonstrate the Board's conviction that the burdens imposed by EPCA are not so severe as their NEPA counterparts. In the Board's view, EPCA does not demand extensive new procedures designed to produce detailed energy statements in advance of ordinary Board hearings:

> In the absence of any specific requirements of EPCA to the contrary, and we perceive none, we believe it preferable as a general matter to integrate the Board's EPCA procedures in hearing cases with-

> in our normal hearing process rather than the unique NEPA procedures. Thus, we will provide that the initial or recommended decision integrate findings and conclusions with respect to the energy conservation and efficiency consequences of the various alternative actions in issue in the case, including where appropriate a brief analysis of such consequences in light of the other public convenience and necessity factors relevant to the decision. These findings and conclusions shall constitute the energy "statement" required by EPCA. This is the procedure we have in essence followed on an *ad hoc* basis since enactment of EPCA [citing, *inter alia*, the *Miami-Los Angeles Competitive Nonstop Case*]. . . . As is the case with all other aspects of an initial or recommended decision, the adequacy of the energy statement is subject to Board review under our usual discretionary review procedures.

Id. at 56670.

Finally, the Board has taken advantage of the opportunity provided by publication of its proposed regulations to inform interested parties that practicality may require limitation of the scope of the Board's energy impact statements. For example, while the Board foresees little problem in evaluating the effects of particular actions on aviation fuel consumption, it expresses concern that so-called secondary effects, such as variations in automobile fuel consumption, may prove impossible to determine. *See id.* at 56670 n.2. The commentary does not reveal whether feasible EPCA inquiries, as conceived by the Board, would entail consideration of increasing American reliance on foreign fuel, or potential peculiarities of local and regional fuel demands, two factors the importance of which is stressed by National.

While the proposed regulations have not yet received final approval, we have canvassed them in some detail because they inevitably color our perception of the arguments made herein pertaining to EPCA. National has maintained since January 7, 1976, less than one month after passage of EPCA, that the Board is obligated to issue a formal energy impact statement in connection with the Miami-Los Angeles route proceeding. One of the Board's responses in its March, 1976 order was that the award of competitive authority in the Miami-Los Angeles market did not constitute a "major regulatory action" within the meaning of § 382(b) of EPCA. At the time, some credence might have attached to this stance, especially in light of the earlier unchallenged conclusion that Docket 24694 did not involve "major Federal action significantly affecting quality of the human environment" under NEPA. However, after examining the Board's newly-proposed EPCA regulations, we believe that the Board cannot, in good faith, continue to assert that its decision in this case was not a "major regulatory action." [13] Given the predicted levels of fuel consumption for Western's Miami-Los Angeles operation, the present route proceeding would clearly qualify as a major action under the new rules, if adopted.

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[13] In its brief to this court, submitted several months before publication of the proposed regulations, National flirted with the argument that the Board, since it had not yet established a formal definition of "major regulatory action," could not legitimately exclude the Miami-Los Angeles case from the "major action" category. We do not believe that as a consequence of EPCA's enactment, five federal agencies became obligated either to treat future administrative matters as "major regulatory actions" or else to suspend further proceedings pending the outcome of rulemaking on the appropriate definition of the statutory phrase. Of course, the agencies were duty-bound to proceed in a responsible and speedy fashion toward the adoption of the statutorily prescribed regulations. However, they were not thereby precluded from making reasonable interim determinations that particular agency decisions did not rise to the level of "major regulatory actions."

Assuming, then, that major regulatory action is involved herein, the question becomes whether the Board has complied with the terms of EPCA's § 382(b). We believe that it has. We agree, at the outset, that the energy impact statement required under EPCA need not be as elaborate or as formal as the environmental statement demanded by § 102(2)(C) of NEPA. The Board's opinion in this case leaves no doubt that energy factors did receive timely consideration (see J.A. 159-64), and that the public benefit to be derived from competition in the Miami-Los Angeles market was found to justify the additional fuel consumption which competitive service would entail.[14] Moreover, as disclosed by the Bureau of Operating Rights study, Western's predicted fuel needs were virtually identical to those of Northwest, and less than those of any other applicant for Miami-Los Angeles authority. J.A. 561. Thus, the Board appears to have chosen a carrier which will provide competition on the Miami-Los Angeles route at a minimal expenditure of fuel.

While we do not suggest that the "practicable and consistent" terminology of § 382(b) confers upon the Board *carte blanche* to ignore energy considerations whenever it finds it convenient to do so, we do express sympathy for the Board's position that this already much-delayed proceeding should not have been further postponed to permit preparation of a detailed energy statement which

[14] National's admirable concern for fuel economy is compromised somewhat by the carrier's representation to the ALJ in Docket 24694 that, if National retained its monopoly status on the Miami-Los Angeles route, it planned to commence operation of a third daily round trip by 1974, the forecast year employed by the ALJ. J.A. 133-34. National never did, in fact, initiate such service, even though it continued to enjoy monopoly authority through the summer of 1976. Nevertheless, the mere promise of a third flight reveals National's judgment that additional fuel consumption might be necessary to adequately serve the Miami-Los Angeles market.

would have been highly unlikely to affect the outcome. Indeed, although future experience may not conform entirely to the Board's expectations, load factors forecast for the Miami-Los Angeles route after the initiation of competitive nonstop service compare favorably with those actually achieved by National during 1972. J.A. 163. At least according to this yardstick, therefore, the Board's award of Miami-Los Angeles authority to Western should yield not a decline, but an improvement, in overall energy efficiency. Of course, National contends that the Board's figures reflect an inflated estimate of the stimulative effect which the introduction of competition may be expected to produce in the Miami-Los Angeles market. But, even if discounted to allow for possible overoptimism, the Board's projections are impressive in light of the Board's own observation that "generally . . . one consequence of the certification of a competitor in a monopoly market is to depress load factors in the short term . . . ." 41 Fed. Reg. at 56672.

Finally, and perhaps most importantly, we agree with the Board that, as applied to individual route proceedings, § 382(b) is primarily intended to ensure that carrier selection is not accomplished in such a manner as to disregard energy conservation considerations. We do not read § 382(b) to impose on the Board an obligation to review all aspects of the airline industry's fuel policies in each route proceeding. As the Board stated in its March, 1976 order,

> fuel consumption should be properly considered on an industrywide basis. . . . [N]ational fuel conservation efforts as they pertain to air transportation should, to the extent feasible, be borne equally by all segments of the air transportation system. Fuel conservation efforts should not deprive particular communities of needed service simply because that service has not been operated before.

J.A. 162. Finding ourselves in basic accord with the sentiments thus expressed, we conclude that the Board has committed no violation of EPCA in this case.

IV

There remain those complaints emanating from the Board's action in shaping its decision by reference to a forecast year different from that used by the ALJ. Both Pan American and National assert that the Board erred in shifting from calendar year 1974 to fiscal year 1977 without affording petitioners an opportunity to participate in supplementing the record to reflect intervening economic developments.

We recognize the difficult and recurring problems faced by administrative agencies trying to cope with the inevitable time lag between the creation of an evidentiary record and the announcement of final agency action. We also acknowledge that, as the Board here contends, necessary updating may on occasion be accomplished by an agency acting independently and informally, without resort to adversarial procedures. However, in the present case, we are persuaded by a combination of factors that fundamental fairness required the Board to give Pan American a chance to submit its own version of changes in circumstances occurring between 1973 and 1976 and to comment upon the relevance of those changes to the award of Miami-Los Angeles route authority.

The factors which, when considered together, impel us to this conclusion are as follows:

(1) the delay involved was substantial, and covered a period peculiarly characterized by new circumstances affecting air transportation:

(2) the record adjustments made by the Board operated significantly to the detriment of a particular carrier;

(3) that carrier has presented plausible arguments refuting the Board's interpretation of certain facts and challenging the Board's alleged failure to take account of other newly available information; and

(4) by attaching such great weight to diminished estimates of Pan American's beyond segment traffic potential, the Board has at least arguably departed from its earlier position concerning the importance of beyond segment service as a carrier selection criterion in transcontinental route cases.

Given all the elements of the situation, we believe the Board was obligated to seek the benefit of Pan American's views regarding the impact of the passage of time upon the record evaluated by the ALJ.[15]

In several cases, the vast majority of them involving the Interstate Commerce Commission, the Supreme Court has addressed itself to the closely related subjects of agency rehearings and reopenings of administrative records. The basic rule, repeatedly endorsed, is that reconsideration or supplementation, in whatever form, is a matter entrusted to agency discretion. The classic statement of this general principle, recently reiterated with approval in both *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 294-95 (1974), and *United States v. ICC (Northern Lines Merger Cases)*, 396

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[15] As noted above, National also challenged the Board's independent updating of the record. We do not believe, however, that National was injured in any way by the Board's refusal to permit participation by the parties. In its 1976 orders, the Board reaffirmed the ALJ's conclusion that the public convenience and necessity required competition on the Miami-Los Angeles route. National has not drawn our attention to any factors which indicate that procedural shortcomings caused the Board to ignore evidence suggesting a contrary outcome on the need for competition issue.

U.S. 491, 520-21 (1970), may be found in *ICC v. Jersey City*, 322 U.S. 503, 514-15 (1944). There, Justice Jackson wrote, in an opinion for the Court:

> One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body.

Justice Jackson observed that only once had the Court reversed an agency "for refusing to grant a rehearing on the contention that the record was 'stale.'" *Id.* at 515. That case, *Atchison, T. & S. F. Ry. v. United States*, 284 U.S. 248 (1932), was soon limited to its special facts, and has had little precedential influence. *See, e.g., United States v. Northern Pac. Ry.*, 288 U.S. 490 (1933); *Baltimore & O. R.R. v. United States*, 298 U.S. 349, 389 (1936) (Brandeis, J., concurring); and 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.18 at 603 (1958).

We note in passing that the facts in the current litigation are far more similar to those presented in *Atchison* than to those confronted by the Court in either *Jersey City* or *Northern Lines*.[16] We also note that on scattered

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[16] In *Atchison*, the ICC had entered an order prescribing maximum rates for the shipment of grain in the western part of the United States. The evidentiary record had been closed in September, 1928, but the Commission's final order was only issued in April, 1931, after two applications for rehearing had been denied. The Supreme Court held unanimously that the existing record in the case pertained to a different economic era, and that it was incumbent upon the Commission to conduct a new hearing to determine the effects of the Great Depression, "the outstanding contemporary fact, dominating thought and action throughout the country." 284 U.S. at 260.

By contrast, in *Jersey City*, the ICC's order granting a fare increase on the so-called Hudson Tubes was issued less than nine months after the conclusion of extensive evidentiary hearings. Two months later, in August, 1943, a limited rehearing was held, confined to the issue of the most practicable means of collecting a nine-cent fare, given the wartime coin scarcity. The Supreme Court decided, not surprisingly, that opponents of the fare increase had no right to relitigate the propriety of the increase in the 1943 rehearing.

Northern Lines was a railroad merger case in which terms were negotiated between the parties by 1961, approved by an ICC Hearing Examiner in 1964, and finally accepted by the Commission in 1967. Throughout the proceedings, the Northern Pacific Stockholders' Protective Committee objected to the agreed-upon exchange ratio governing transfers of stock between shareholders of the two principal parties to the merger, Great Northern and Northern Pacific. In reviewing the Commission's endorsement of the merger, the Supreme Court rejected the Committee's contention that the ICC should have reopened the record in 1967 for the taking of new evidence on the exchange ratio. The Court was obviously impressed by the fact that the exchange ratio was the product of hard bargaining between the parties, and had twice been approved by overwhelming majorities of Northern Pacific shareholders.

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occasions, the Board itself has agreed to reopening of the record for reasons hardly more compelling than those raised by petitioners here. *See, e.g., Service to Omaha and Des Moines Case*, Order 72-8-72 (August 16, 1972); *Atlanta-Detroit/Cleveland/Cincinnati Investigation*, Order 72-7-98 (July 28, 1972); and *Additional Service to San Diego Case*, Order 71-4-112 (April 16, 1971).[17] On the

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[16] [Continued]

Although the changed economic conditions present in *Atchison* were clearly more acute than those involved here, the earliest of the three cases described above still seems to resemble the current situation more closely than do either *Jersey City* or *Northern Lines*. One further point remains to be made. Both *Atchison* and *Jersey City* were rate-making cases, and *Northern Lines* involved a merger, presumably desirable to the primary participants therein. Here, by contrast, we are concerned with *competing* applicants for authority to operate air service over a given route. Arguably, at least, the impetus toward reopening an administrative record is greater where an agency's task is to choose between similarly-situated private parties, all of whom are doubtless capable of providing the service at issue.

[17] In *Omaha and Des Moines*, the Board had deferred action on petitions for reconsideration filed shortly after issuance of a 1970 order. When, almost two years later, the Board finally began to review the petitions, it decided to reopen the record saying

> [t]he existing record—with 1967 as the base year and 1970 as the forecast year—is clearly too stale to permit a decision on the merits without further evidentiary proceedings. In addition, the normal growth rates adopted by the examiner on the basis of 1964-1967 historical experience appear to be too optimistic in light of more recent traffic trends. New record evidence is therefore desirable.

In *Atlanta-Detroit*, reopening was ordered to consider possible effects of the Allegheny-Mohawk and Delta-Northeast mergers on various carrier selection criteria. Conceding that the record, with 1968 as the base year and 1971 as the forecast year, was "somewhat stale" by July, 1972, the Board also expressed a desire to take account of "recent traffic

other hand, in *Bowman* a unanimous Court concluded that there was "sound basis for adhering to [the] practice of declining to require reopening of the record, except in the most extraordinary circumstances," despite the fact that "the evidentiary material [in the record] pertained to service conditions which were dated by five years at the time the Commission rendered its decision."[18] 419 U.S. at 294, 296.

The most important point for our purposes, however, is that petitioners here do not seek reopening merely on the ground of delay. As Pan American has emphasized, the complaint focuses not so much on staleness as on the selective character of the updating voluntarily undertaken by the Board. Pan American objects first of all to the Board's adjustment of the beyond-segment traffic figures generated by the ALJ. In his 1973 decision, the ALJ concluded that a primary reason for certification of Pan American on the Miami-Los Angeles route was the carrier's projected ability to serve over 132,000 beyond-

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trends" which indicated that the growth ratio adopted by the examiner had been too high.

In *San Diego*, the Board erroneously used fiscal 1971 rather than calendar 1971 traffic estimates in attempting to determine whether Western could continue to operate profitably if competition were certificated on the San Diego-Denver route. The revised figures made an already close question even closer, and the Board decided to reopen the record to get the benefit of the most recent traffic and cost data.

[18] Why the *Bowman* Court felt constrained to discuss the reopening issue is something of a mystery. Justice Douglas's opinion purports to respond to concerns expressed by the three-judge District Court, but the cited portion of the District Court's lengthy opinion contains virtually no reference to the undesirable consequences of administrative delay. The private appellants in the Supreme Court suggested that the District Court had invalidated the ICC order under review at least partially because that order was based on a stale record. *See* Brief for Private Appellants at 54. This position finds

segment passengers during calendar year 1974.[19] This figure was far greater than the beyond-segment benefits claimed by other applicants; it was even further in excess of the beyond-segment traffic which the ALJ believed other applicants had a legitimate possibility of carrying.[20] Nevertheless, in March, 1976, when the Board issued its first opinion in the Miami-Los Angeles proceeding, that opinion declared that "on a relative basis, the record shows that Western will be able to provide more significant beyond benefits than any other applicant." [21]

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no support in the District Court's opinion. Indeed, the lower court's only direct reference to the age of the record appeared not in its opinion on the merits but in its opinion three weeks later, denying the Commission's motion to amend the judgment and remand for further proceedings. *See* Arkansas-Best Freight System, Inc. v. United States, 364 F. Supp. 1239, 1266-72 (W.D. Ark. 1973). *See also* Appellees' Brief to the Supreme Court at 61. Given this background, the precedential value of the reopening aspect of *Bowman* seems highly dubious.

[19] A beyond-segment passenger is one who must utilize Miami-Los Angeles service in connection with a longer trip whose point of origin or destination or both is neither Miami nor Los Angeles.

[20] Western offered the second largest beyond-segment potential, *i.e.*, nearly 57,000 beyond-segment passengers in 1974. The ALJ reduced this estimate to a figure just below 44,000.

[21] In a footnote, the Board delivered its appraisal of the statistics upon which its comments were based:

> The traffic estimates are those set out by the administrative law judge, which are not seriously challenged by the other applicants. However, Western's exhibits show far more beyond traffic, and the Board agrees that in view of market growth since the conclusion of the evidentiary hearing and the use of a later forecast year, it is likely that the estimates reflected in the initial decision understate Western's total support traffic. Nevertheless, for present purposes we shall assume that the administrative law judge's estimates are reasonable, since the use of Western's higher figures would not materially affect our conclusions in this case.

Addressing itself to the greatly superior beyond-segment potential attributed to Pan American by the ALJ, the Board announced that

> we share the uniform judgment of all of the other applicants that Judge Dapper's estimates . . . seriously overstate the support traffic that Pan American is in any way likely to obtain. It is our conclusion that as a result of the cumulative effect of the overstatements that we have found extant in traffic forecasts for Pan American and the changes to its beyond-terminal services since the conclusion of the evidentiary proceedings, Pan American will not be able to realize, at the outside, more than 50 percent of the beyond-segment traffic support predicted by Judge Dapper, or about 65,000 passengers annually. Even this figure, in our judgment, is in all likelihood too optimistic by an appreciable margin, but we accept it for present purposes.

Three explanations were advanced for the Board's reduction of Pan American's predicted beyond-segment traffic. In the first place, actual experience in the wake of the ALJ's decision had revealed that the growth estimates employed were too high, and that therefore traffic in many contributory markets had not reached expected levels. Secondly, the Board cautioned that

> the value of Pan American's proposed single-plane flights will be compromised to a far greater extent than anticipated in the initial decision by the extremely long-haul nature of the carrier's proposed service in many markets. . . . These considerations significantly reduce the stimulative value of Pan American's proposed service. At the same time, they increase the possibility that Pan American will lose Miami passengers to other carriers for at least a portion of the complete trip.

Finally, "substantial alterations in Pan American's route structure and service patterns" occurring since the close

of economic hearings in 1973 were said to have "fatally undermine[d] Pan American's asserted ability to flow enough traffic over the Miami-Los Angeles segment to support its proposed level of service." In particular, the Board feared that Pan American's suspension of service at "many important Caribbean points" would render the carrier incapable of meeting its beyond-segment traffic goals.

In its petition for reconsideration before the Board and in its brief to this court, Pan American has responded to the Board's new calculations by accusing the Board of selectively ignoring certain factors, some of them favorable to Pan American, other adverse to Western. For example, Pan American contends that its termination of service to various Caribbean markets occurred as a result of Board-approved agreements with Trans World Airlines and American Airlines, pursuant to which Pan American obtained increased access to trans-pacific traffic. According to Pan American, its augmented beyond-segment potential in the Pacific would largely, if not completely, offset any diminution of beyond-segment traffic originating in or destined for the Caribbean. Pan American also objected to the Board's uncritical acceptance of Western's beyond-segment traffic as projected by the ALJ in 1973. Since that date, Miami-Las Vegas and Miami-San Francisco service by other carriers had improved significantly, according to Official Airline Guide schedules, thereby casting doubt on the estimated numbers of beyond-segment passengers Western could hope to carry in those markets. In addition, Pan American challenged the Board's conviction that Western would benefit 7,000 beyond-segment passengers with single-plane service between Miami and Seattle. The unadjusted ALJ figure was seriously jeopardized, Pan American argued, by the Board's 1976 invitation to Braniff, Continental, and Eastern to apply for removal of restrictions which, if granted, would permit the latter airlines to offer single-plane Miami-Seattle service via shorter and faster routings through Texas and St. Louis.

The Board's alleged shortcomings with respect to beyond-segment traffic estimates were exacerbated in Pan American's view by the Board's failure to modify Pan American's proposed service frequency in order to approximate a rational carrier reaction to reduced levels of available traffic. Pan American notes that the Board, in attempting to demonstrate that National could continue to operate profitably after certification of a competitor on the Miami-Los Angeles route, assumed that National would provide only two daily round trips, despite the carrier's representation during the economic hearings that three such trips would be offered. The Board justified this assumption on the ground that twice daily round trip service would constitute a "rational response" by National to Western's entry into the Miami-Los Angeles market. Yet, in assessing the merits of Pan American's application, the Board first drastically cut the amount of traffic which the applicant could be expected to carry, and then left undisturbed the applicant's service proposal of three round trips daily. As a consequence, the Board concluded that

> [t]he nearly 300,000 additional seats per year proposed by Pan American are . . . not needed for the local market. . . . The loss of . . . forecast support [i.e., beyond-segment] traffic would fatally impair Pan American's ability to operate its proposed three daily round trips on a profitable basis, and consequently vitiates any basis for selecting Pan American in preference to Western."

In rebuttal, Pan American submitted a revised service proposal, designed to illustrate that, even with the reduced numbers of passengers predicted by the Board, the carrier could still operate two daily round trips profitably. *See* Appendix A to Pan American's Petition for Reconsideration, J.A. 510-11.

The above summary describes Pan American's most serious criticisms of the Board's performance in the current route proceeding.[22] Although not specifically raised by the parties, one further facet of the Board's treatment of beyond-segment traffic deserves attention here. In 1969, when competitive authority on the Miami-Los Angeles route was originally awarded to Northeast, the Board casually dismissed beyond-segment service as an important carrier selection criterion in transcontinental markets:

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[22] Two other grievances should be mentioned briefly. The first relates to the Board's fear that Pan American's lengthy flights to overseas destinations would detract from the carrier's ability to serve the local Miami-Los Angeles market. By contrast, the Board praised Western's service proposal because one of the two daily round trips would be devoted exclusively to the Miami-Los Angeles run and the other would serve only a single beyond destination, Seattle. In actual operation, however, Western's flights have originated each day in Honolulu and Anchorage, and the latter flight has served Seattle as well. Not surprisingly, Pan American questions whether the Board could legitimately have preferred Western on the basis of superior attention to the Miami-Los Angeles route.

Secondly, Pan American notes that, with respect to at least one flight daily, Western has not fulfilled its promise of "convenient morning and late afternoon departures from both Miami and Los Angeles and convenient arrivals at both points." Western has in fact been operating a so-called "red-eye" flight departing Los Angeles each evening at 10:20 P.M. and arriving in Miami the following morning at 6:15 A.M.

Western and the Board explain that the scheduling discrepancies stressed by Pan American are attributable to Western's current need for a new DC-10 aircraft which has already been ordered. The Board expresses confidence that Western "will shortly be able to institute schedules that are consistent with its service proposal." Given our disposition of this case, we would, of course, anticipate that the likelihood of Western's adherence to its original proposal will be considered by the Board after supplementation of the record.

> [W]e do not believe that beyond-segment benefits should be accorded significant weight in the transcontinental route awards. By their very nature transcontinental markets afford little opportunity for substantial traffic development beyond the terminals.

Notwithstanding these earlier comments, the ALJ in 1973 obviously assigned considerable weight to what he perceived as Pan American's markedly superior beyond-segment potential. In reversing the ALJ three years later, the Board did not rely upon its previously announced disregard for beyond-segment benefits in transcontinental cases. Rather, the Board appeared to concede that beyond-segment traffic was a significant factor, but differed with the ALJ in his estimates of the amount of such traffic which Pan American would carry, and of the impact such traffic would have on Pan American's ability to serve the Miami-Los Angeles market.

Inconsistency in agency application of policy guidelines has long posed a problem for reviewing courts. On the one hand, it is clear that administrative agencies require a broad flexibility in order to accomplish their statutorily conferred tasks, and that therefore court-developed principles of *res judicata* and *stare decisis* cannot be mechanically applied in the administrative process. *See, e.g., Outagamie County v. CAB*, 355 F.2d 900, 906 (7th Cir. 1966) ("the Board is not required in every case to weigh in the balance all of the possible factors that may be considered . . . . [A] circumstance may weigh heavily in the balance in one case but be missing from the scales completely in another balance."). *See also* Note, Developments in the Law—Res Judicata, 65 HARV. L. REV. 818, 865-74 (1950).

On the other hand, the probability of frustration is plainly high when interested parties are told in 1969 that beyond-segment benefits are essentially irrelevant

to transcontinental route awards, only to find in 1976 that the Board, when examining the very same route, behaves as if the prior statement had never been made. Respected commentators have frequently deplored agency decision-making which fails to adhere to promulgated policy choices, at least where such departures are not accompanied by explicit articulation of the reasons therefor. *See, e.g.*, Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (pt. 2), 75 HARV. L. REV. 1055, 1096 n. 329 (1960) ("the Board ought [to] be able to say *something* as to *how* [carrier selection] factors are weighed—which are more important and which less—and to develop some useful quantitative tests of these . . . factors through careful economic study") (emphasis in original); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 529 n. 173 (1970); and Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607, 613 (1959). And courts have upset agency action for unexplained departures from earlier reasoning. *See, e.g., City of Lawrence v. CAB*, 343 F.2d 583 (1st Cir. 1965). In this case, where the Board's seemingly inconsistent policy posture is combined with Pan American's credible attacks on the Board's selective updating technique, we are convinced that supplementation of the record is necessary to assure fairness to the competing applicants.

In advocating the result we reach, Pan American has referred us to two cases which it claims support such an outcome. *See Delta Air Lines, Inc. v. CAB*, 442 F.2d 730 (D.C. Cir. 1970); and *Northeast Airlines, Inc. v. CAB*, 345 F.2d 484 (1st Cir.), *cert. denied*, 382 U.S. 845 (1965). Intervenor Western has replied by maintaining that both *Delta* and *Northeast* are distinguishable on

their facts from the present situation. Indeed, the former case certainly does present a more egregious example of the type of abuse which we confront here.[23] But

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[23] In *Delta* the Board addressed itself to the award of new authority on several routes connecting major markets in the southeastern United States. In granting such authority to Southern Airways, the Board twice strayed from the correct procedural path. In the first place, the Board, while retaining and continuing to use *1969* estimates of Southern's annual costs, simultaneously factored into its profitability calculations a *1970* forecast of the airline's operating revenues. This forecast was independently developed by the Board after the close of economic hearings. More pertinent for our purposes, Southern was the only applicant for which such a 1970 forecast was made. This court held that "updating can only be justified if done on a *comparative* basis, *i.e.*, updating the forecasts for all parties." 442 F.2d at 736. Judge Wilkey's opinion listed several procedural alternatives which might allow updating to be accomplished without the necessity for a new formal hearing. *Id.* In a footnote, the opinion warned, but did not decide, that some form of adversarial device might be required.

> Even if the parties had had opportunity to update their own forecast data to the year 1970, we are not saying that required administrative procedure would have been satisfied without an opportunity for the adverse parties to subject the various calculations to cross-examination and analysis.

Id. at 736 n.25.

The precise facts in *Northeast* are a bit murky, but the basic point is clearly the same. On remand after an earlier First Circuit ruling, the Board elected to take notice of some recent operating statistics without affording Northeast an opportunity to rebut or explain the figures. The carrier apparently wished to submit additional figures as well as certain "expert testimony of an interpretive and prognostic variety." The court agreed that Northeast should have that chance.

> [A]s soon as [the Board] elected to look at matters [beyond the record as it originally existed,] it could not pick and choose, at least to the extent of denying an objecting party the rights . . . to rebut not only those mat-

even if the errors committed in past cases are conceded to be more flagrant than any involved here, the opinions of this court and the First Circuit still support the general proposition which we now apply, namely, that when an agency chooses to update an administrative record, it must proceed in a manner fair to all concerned. Under certain circumstances, especially where the delay is long, the case close, and the intervening events significant, participation by interested parties may well be indispensable. Thus, we remand this case for adversarial exploration of the recent developments considered by the Board in reaching its decision to prefer Western over Pan American. We direct the Board to reexamine that decision in light of the updated record so produced. In the interim, the Board's 1976 orders will not be vacated, and service by Western on the Miami-Los Angeles route will not be suspended.

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ters it looked to, but also the inferences which were sought to be drawn therefrom. Due process could permit no less. . . .

Having opened the door to new data, the Board was obliged to take a full look.

345 F.2d at 486-87. It is impossible to tell from the court's intentionally limited opinion exactly how grievous the Board's indiscretion was.

APPENDIX B

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

DOCKET 24694

MIAMI-LOS ANGELES COMPETITIVE NONSTOP CASE

Decided: March 15, 1976

Western Air Lines, Inc.'s certificate for Route 35 amended to authorize nonstop service between Miami-Ft. Lauderdale, Fla., on the one hand, and Los Angeles-Ontario, Cal., on the other.

Delta Air Lines, Inc.'s certificate for Route 27 amended to remove segment 7 therefrom.

All other applications are denied, and the proceeding terminated.

This decision does not constitute a major Federal action significantly affecting the quality of the human environment (See p. 33).

APPEARANCES:

Same as in the initial decision, and, in addition, the following:

John Ferraro, for the Los Angeles Area Chamber of Commerce, and the Department of Airports, City of Los Angeles, California.

OPINION

BY THE BOARD

This proceeding involves a determination of the need for competitive nonstop service between Miami-Ft. Lauderdale, Florida, and Los Angeles-Ontario-Long Beach, California. The long and complicated history of the Board's efforts to resolve this question is detailed in the following section. For present purposes we note that this case was set for hearing as a result of the Board's decision in the *Delta-Northeast Merger Case* to reexamine the authority it had previously granted Northeast Airlines to compete in the Miami-Los Angeles nonstop market with National Airlines, the only other carrier certificated to provide nonstop service in that market. Following a public hearing, Administrative Law Judge William H. Dapper issued an initial decision in which he determined that the public convenience and necessity continue to require the authorization of competitive nonstop service, and that Pan American World Airways should be selected to provide that service. The Board has exercised its right of discretionary review, briefs to the Board have been filed, and oral argument has been heard.

Upon consideration of the matters presented, the Board has decided to affirm Judge Dapper's finding of need for competitive service in the market at issue. On the other hand, we have determined that the public convenience and necessity would best be served by selecting Western Air Lines as National's nonstop competitor. Accordingly, except to the extent modified herein, we adopt as our own the findings and conclusions of the administrative law judge, whose initial decision is attached as an appendix.

We now turn to a detailed discussion of findings and conclusions.

1. Background

An appreciation of the long and complicated history of this case is necessary to an understanding of our decision in this proceeding. That history may be divided into two phases: the first phase involves the Board's decision to reexamine Northeast's Miami-Los-Angeles nonstop route award; the second phase involves a number of important procedural events occurring subsequent to the issuance of Judge Dapper's initial decision.

A. Northeast's Miami-Los Angeles Nonstop Authority

National Airlines was authorized to serve the Miami-Los Angeles nonstop market in the *Southern Transcontinental Service Case*, 33 C.A.B. 726 (1961), and that carrier had a monopoly for approximately eight years, until six years ago, when the Board found that competitive service was required by the public convenience and necessity. Northeast Airlines was awarded competitive nonstop authority, based upon a finding that the route would strengthen the financially beleaguered carrier, and upon assurance from the carrier that it was not seeking the route simply to make itself more attractive to prospective merger partners. See Orders 69-7-135 and 69-9-111. As it turned out, shortly after Northeast's authority became effective, the carrier's management made a firm decision to seek a merger with Northwest Airlines.

The two carriers submitted the resulting merger agreement to the Board for approval, but the Board found that the proposed merger vitiated the basis of the Board's earlier award to Northeast and that, in such circumstances, the proposed merger would be consistent with the public interest only if the authority of the surviving carrier—Northwest—to operate the Miami-Los Angeles route was stayed and reexamined

in a separate investigation. Order 70-12-162. It is significant to point out at this juncture that in the *Northwest-Northeast Merger Case* Delta Air Lines, which now claims that Northeast's Miami-Los Angeles authority must be transferred to it as a matter of law (*infra*, at 11), opposed the transfer of the Miami-Los Angeles segment to Northeast on the grounds that such transfer would permit Northeast to "traffic" in certificates. More importantly, Delta stated to the Board in that proceeding that it "stands ready and willing to merge with Northeast under terms and conditions agreeable to both parties *whether or not* the Miami-Los Angeles segment is transferred to Delta as part of the merger," and that Delta "is amenable to participating in a Section 401 proceeding vying for the [Miami-Los Angeles] authority along with other interested applicants." Order 71-3-8, p. 6, fn. 16.

The *Northwest-Northeast* merger collapsed, principally because Northwest was unwilling to accept the conditions the Board attached to Northeast's Miami-Los Angeles authority. Shortly thereafter, Northeast entered into a merger with Delta. The Board approved the merger, again subject to the condition that any authority to operate over the Miami-Los Angeles segment should be stayed pending completion of an ancillary investigation to determine "whether the route should be transferred to Delta, awarded to a different applicant, or allowed to lapse." *Delta-Northeast Merger Case*, Orders 72-5-73/74, at pp. 27-29. The Board emphasized that "all of the essential factors that led us to our stay of the Miami-Los Angeles route in *Northwest-Northeast* are present here virtually unchanged and we cannot apply a different test to Northeast in this case." Moreover, the Board noted that "both Delta and Northeast were fully aware of the Board's position on the Miami-Los Angeles route at

the time they concluded their merger discussions, and thus neither can contend that transfer and stay will occasion an unforeseen financial impact on it." Order 72-5-73 at pp. 27-28. Delta accepted the terms and conditions which the Board attached to its approval of the merger. Pursuant to the stay, competitive service in the Miami-Los Angeles market was terminated in July, 1972, and, by Order 72-8-95 (August 23, 1972), the instant *Miami-Los Angeles Competitive Nonstop Investigation* was instituted. The instituting order advised that the investigation was being conducted pursuant to the Board's general powers under Section 204 of the Act, and insofar as Delta's claim to the Miami-Los Angeles segment is concerned, pursuant to the Board's power to (1) alter, amend, or modify certificates under Section 401(g), and (2) impose terms and conditions on mergers approved pursuant to Section 408(b).

B. Subsequent Procedural History

Evidentiary proceedings were held in early 1973, and, on June 13, 1973, Judge Dapper issued his initial decision. The Board granted discretionary review of the initial decision and briefs were submitted to the Board. However, in response to a contention raised by National Airlines in its brief, further review proceedings were then deferred to consider the environmental impact of a possible award in this case. In response to the Board's order, the Bureau of Operating Rights prepared and circulated an assessment of the environmental consequences of competitive service. The assessment was not completed until December 1974. The Bureau concluded that the certification and implementation of any of the service proposals presented by the applicants would not constitute a "major federal action significantly affecting the quality of the human environment" within the meaning of section

102(2)(c) of the National Environmental Policy Act of 1969. Having determined that a draft environmental impact statement was unnecessary, the Bureau presented its findings in the form of an Environmental Negative Declaration.

Two other matters of procedural importance warrant comment here. First, by motion filed on November 27, 1974, Continental Air Lines seeks a reopening of the record in this case and a remand of this proceeding on the matter of carrier selection. Continental argues, *inter alia*, that in view of substantially changed circumstances since the close of the evidentiary hearings, it is unlikely that Pan American could profitably operate the service which the administrative law judge found it could provide. Second, by motion filed on January 6, 1976, National seeks to defer all further procedural steps in this proceeding "pending an investigation and statement of the probable impact on energy efficiency and energy conservation of nonstop competitive authority in the Miami-Los Angeles market."[1]

By Order 75-1-114 (January 28, 1975) the Board decided to defer consideration of Continental's motion pending oral argument. That order also reopened the record to permit BOR to file its environmental assessment and to allow interested persons the opportunity to file comments.

Oral argument, the final procedural step, was held on April 16, 1975.

2. The Need for Competitive Nonstop Service

As noted, the Board has previously determined that the public convenience and necessity require competi-

[1] The motions of Continental and National will be denied. See pp. 32-38 *infra*.

tive nonstop service in the Miami-Los Angeles market. Judge Dapper concluded that the record in this proceeding confirms the Board's prior determination. He found that the Miami-Los Angeles market, the largest monopoly market in the country in terms of revenue passenger-miles, was large enough to support competitive service, and that competitive service was required because of historic and existing service deficiencies and the public benefits that competition may be expected to bring in assuring the future development of the market. I.D. 16-31.

On review, all parties, except National, support his decision that there is a need for competitive nonstop service between Miami and Los Angeles.[2] National contends that its services have been excellent; that its moderate load factors demonstrate that there is no need for additional capacity; that the market cannot sustain competitive operations; that even if the market could support such operations, a competitive award would be inconsistent with Board decisional standards; and that competition would result in excessive diversion from National.

The Board agrees with Judge Dapper's conclusions.

In deciding to authorize competition in 1969, the Board found the basic deficiency in National's Miami-Los Angeles service to be the carrier's failure to develop its monopoly market aggressively, and, in pa[illegible]-

[2] The City of Long Beach, which is not a formal party to this proceeding, has filed a statement with the Board indicating that it neither seeks nor desires additional air service to Long Beach in this proceeding. It requests that the Board not include Long Beach as a hyphenated point as recommended by the administrative law judge. The City's request will be granted. There is no evidence in the record that the traveling public would be adversely affected by a granting of the City's request. In fact, no carrier applicant proposes to provide Miami-Los Angeles service via the Long Beach airport.

ticular, to provide a sufficient level of nonstop frequencies. At that time, National was providing two daily nonstop round trips, which translated into 1.4 nonstop flights per 100 passengers. The administrative law judge concluded in this proceeding that National has continued to neglect the service needs of the Miami-Los Angeles market. He found, *inter alia*, that National still provides only two daily nonstop round trips and, more significantly, that it provides *fewer* nonstop flights per 100 passengers than it did in 1969 when the Board first found its service to be deficient.[3] Our review of the evidence discloses that National's monopoly service continues to be characterized by a preponderance of multistop flights. In fact, notwithstanding National's exclusive nonstop authorization, the record reveals that two-thirds of the carrier's Miami-Los Angeles flights have consisted of one-, two-, or three-stop frequencies. Our review of the carrier's schedules since the conclusion of the evidentiary hearings also discloses that National has not upgraded the quality of its monopoly nonstop service. The carrier continues to operate a basic pattern of two daily nonstop round trips, with some additional service on the weekends. One of its westbound flights does not arrive in Los Angeles until almost 1 a.m.[4] As a result, the record discloses that only slightly over 80 percent of the Miami-Los Angeles local passengers today utilize nonstop schedules, despite the substantial inherent advantages such schedules offer in terms of shorter flight times and fewer occasions for delays. For a long-haul market of

[3] Judge Dapper found that based upon the most recent figures available National was offering the Miami-Los Angeles market only 0.76 nonstop frequencies per 100 passengers. He noted that although National had switched operations with wide-bodied aircraft, a weighing of National's nonstop frequencies to account for National's increased capacity produced a figure of only 1.27 nonstop flights per 100 passengers. I.D. at 22.

[4] See O.A.G. March 1, 1976.

such density, the percentage of travelers not using nonstop service in this market appears to us relatively high, reflecting the relative paucity of nonstop schedules by National; with the stimulus of competition, we would expect this percentage to diminish materially.

The quality of National's nonstop service in the Miami-Los Angeles market is in striking contrast to the quality of service in other southern tier markets where it must compete. Thus, for example, although Miami-Los Angeles accounted for more than 50 percent of National's total Miami-Los Angeles/Houston/New Orleans passengers in 1974, it accounted for only 25 percent of National's Miami-Los Angeles/Houston/New Orleans nonstop flights in that year. In these circumstances, we are concerned that without the spur of competition, National will continue to focus its attention on southern tier competitive markets to the detriment of the needs of Miami-Los Angeles travelers for improved service. Viewed from this perspective, it is clear that competition is the best guarantee that good service will be provided in the Miami-Los Angeles market, and that the market will be developed in a manner commensurate with its travel requirements.

National is correct in its assertion that its Miami-Los Angeles load factors are not high. We do not, however, share its contention that its load factors obviate the need for a competitive award. To begin with, the market is quite large and does not receive the attention which National accords its competitive markets. There is no evidence that National has aggressively promoted its Miami-Los Angeles nonstop operations. Indeed, although National was required by the terms of Judge Dapper's Prehearing Conference Report to submit evidence of its Miami-Los Angeles promotional efforts, it provided none, stating that it "does not have

the requested information available."[5] In short the Board cannot attach significant weight to load-factor data where, as here, it is likely that the carrier's modest load factors on the nonstop flights are attributable, at least in part, to National's focus on multistop flights, casual promotional efforts, or both. In any case, we do not believe that this market should be deprived of the benefits of competition even if we assume for present purposes that National's load factors support its assertion that it has provided ample service, and that the carrier will (as it claims) add additional nonstop flights as the growth of the market requires. In this connection, we have already stated that "[a]s the Board has often observed and as the courts have recently emphasized, the Act required the Board to foster competition as a means of enhancing the development of air transportation on routes which can support competing carriers—except where the benefits of competition are outweighed by other public interest considerations. See *Continental Air Lines v. CAB*, No. 74-1651, September 22, 1975."[6] Thus, the mere fact that an incumbent claims to be ready to meet growing traffic demand does not foreclose a competitive award.

As discussed, we share Judge Dapper's conclusion that the record establishes that, at the very least, competition is necessary to assure the continued growth and development of the market. Further, as we shall now discuss, the record also shows that the Miami-Los Angeles market is sufficiently large and strong to support competition.

The administrative law judge in the proceeding below estimated that O&D plus interline connecting traf-

[5] See National's cross-reference list to Information Exhibits.

[6] *Remanded Reno-Portland/Seattle Nonstop Service Investigation*, Order 75-11-45, November 12, 1975. See, also *Philadelphia-Rochester/Syracuse Case*, Order 76-1-119, January 30, 1976.

fic in the Miami-Los Angeles market would total 261,000 O&D and interline connecting passengers in the forecast year, CY 1974, before competition. After competition, he projected a total market of 313,000 local O&D and interline connecting passengers. I.D. 16-21. The Board's O&D Survey indicates, however, that traffic did not reach the predicted level in CY 1974. National uses the difference between forecast and survey traffic levels as a springboard for arguing that the market will not be able to support competition. In doing so, however, it does not give due consideration to two important and interrelated considerations. First, the market's failure to reach predicted levels reflects in part the effects of the economic recession and related lag in traffic growth, National's own service deficiencies, and, more recently, a prolonged strike by National's employees which eliminated nonstop service in the market for about three and one-half months. Second, notwithstanding the foregoing problems, the market continues to grow—although not at the rate forecast by the administrative law judge. Thus, between 1972 and 1973, traffic increased by about 7 percent on an annual basis. Traffic growth dipped to about 3 percent during 1974, and, according to figures provided by National, continued at this rate of growth during the first six months of 1975. We note, however, that traffic increased by more than 8 percent in the second quarter of 1975 when compared to a similar period in the preceding year.

In any case, it is likely that the year ending June 30, 1977, will be the first full year of service, rather than the forecast year used by the parties and adopted by the administrative law judge. To compute traffic in the forecast year, we have applied growth and stimulation factors of 7 percent and 20 percent, respectively, to 1974 O&D plus interline connecting traffic reported

in the Board's Survey.[7] The resulting traffic estimate of 269,403 annual passengers before competition, and 323,000 passengers after competition, approximates the figures predicted by Judge Dapper, and therefore corroborates his finding that there is ample traffic available to support competitive service.

Our assumed growth rate reflects our judgment that traffic growth in the market will neither rebound to historic levels reflected in the record and used by Judge Dapper (11 percent), nor continue at its present low rate (3 percent), but, rather, will level off at a rate falling between these two figures. As noted, the evidence is that traffic in the market has been unusually depressed in recent years by the combined effects of substandard service, no service during National's strike periods, and the nation's general economic malaise, which has depressed the industry's growth rate. In these circumstances, we are confident that the forces of competition will eliminate the service-related depressants, and, based on recent indications, that economic conditions in general and in the industry will improve sufficiently to permit realization of the modest rate of growth here predicted for the Miami-Los Angeles market.[8] Furthermore, we find no basis in the record to question the administrative law judge's use of the 20 percent stimulation figure in view of existing service deficiencies and the benefits that first effective competition should provide.

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[7] Traffic estimate:

1974 Market*	Annual Growth	Forecast Year Market Without Competition	Stimulation	Forecast Year Market With Competition
227,350	7%	269,403	20%	323,284

* Local O&D plus interline connecting traffic, from C.A.B. Traffic Survey Tables 8 & 10.

[8] Cf. *Reopened Service to Omaha and Des Moines Case*, Order 75-9-19, dated September 8, 1975, at 5.

Our conclusion that the Miami-Los Angeles route can support competition is confirmed by evidence showing that National and Western, the applicant that we have selected as National's new competitor, can both operate at substantial profits. We discuss Western's prospects for viable operations in greater detail at pp. 20-21 of this opinion. At this point, we focus primarily on our conclusion that National can operate profitably in competition with Western. National's contrary view is based essentially on its representation during the economic hearings that it would operate three daily round trips in the forecast year of record, *i.e.* 1974, with or without competition. Two years have passed since the conclusion of the economic hearings and National has failed to provide three daily round trips as predicted. Assuming, therefore, that Western operates in proposed nonstop frequencies, and assuming a rational response by National, it is unlikely that National will operate three round trips in competition with Western in the forecast year.

In all these circumstances, we have projected what we believe to be a reasonable estimate of National's prospects for competitive nonstop operations.[9] Based upon evidence of record and other officially noticeable data, it is our judgment that National will carry a total of about 167,000 annual nonstop passengers over the Miami-Los Angeles route, or more than 450 passengers a day. This traffic figure translates into an average

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[9] Traffic projection for National and Western:

	Forecast Year* Market with Competition—Local O&D plus Interline Connecting traffic	Nonstop Traffic at 90%	Carrier Share at 50%	Beyond-Segment Traffic Support	Total Nonstop Segment Traffic	Annual* Seats	Load Factors
National	323,284	290,956	145,478	21,822	167,300	356,269	47%
Western			145,478	43,800	189,278	342,248	55%

* See p. 7, *supra*.

** Source, Exs. NAL-200-R and 378-R.

annual load factor of about 47 percent on National's nonstop flights for the first full year of competitive service—an average which is considerably above its break-even load factors for the route and aircraft in question.[10] This traffic projection warrants three explanatory comments here. First, we have assumed that since both National and Western will each provide two daily nonstop round trips, they will divide the nonstop market equally. We point out, however, that National may in fact carry a greater share of the nonstop traffic, at least initially, in view of its entrenched position and the greater capacity that it proposes to offer. Second, we agree with Judge Dapper that at least 90 percent of the total passengers in the market should be carried on nonstop flights, assuming that National and Western each offers at least two well-timed daily nonstop frequencies. National, however, argues that historic experience in the market indicates that only 81 percent of total market passengers will use nonstop services. In our judgment, National's figure supports, rather than refutes, our finding, since the first truly effective competitive nonstop operations should be able to increase nonstop participation by at least 10 percent to reach the 90 percent figure that we have found reasonable. Third, consistent with Board precedent, we have included support traffic that is likely to be available to National, but not its competitor, and *vice versa*. National has not provided evidence that would permit a definitive estimate of the level of such traffic. Nevertheless, as pointed out by a number of parties, and as recognized by the administrative law judge,[11] there is a substantial discrepancy between the O&D plus interline connecting traffic reported in the Board's surveys for the Miami-Los Angeles route and the traffic actually carried over the route by National, and the difference between the two figures represents, in significant part, National's on-line beyond-segment traffic support. For example, National's exhibits show that in CY 1971 it carried 22 percent more traffic over the segment than is reported as local O&D and interline connecting passengers in the Board's Survey data. Other discrepancies range as high as 26 percent. Giving due consideration to the possibility of statistical error, and to flow traffic which Western may intercept, we may reasonably conclude that the O&D plus interline connecting traffic projected in the table above for National should be conservatively increased by at least 15 percent to reflect beyond-segment traffic support that National is likely to carry on its Miami-Los Angeles nonstop flights in the forecast year.

[10] See Oral Argument Tr. at 169.

[11] I.D. at 21.

National argues that even if the Miami-Los Angeles route can support competition, competition should not be authorized unless the Board determines that both National and its competitor can achieve load factors in the 52.5-55 percent range. National asserts that a contrary conclusion would be inconsistent with the *Domestic Passenger-Fare Investigation, Phase 6B*, Order 71-4-54, April 9, 1971. Alternatively, National maintains that if the Board determines that the market requires competition, competition should be authorized on a "contingent basis," with its competitor's new route authority effective only if National's load factors reach a certain level for a specified period of time, *e.g.*, 65 percent for nine consecutive months.[12] The administrative law judge properly rejected National's last-ditch efforts to avoid competition over the Miami-Los Angeles route.

We perceive two fundamental and interrelated defects in National's contentions. First, they are based

[12] See Transcript of Oral Argument at 186.

upon the unsupported assumption that load factors are the sole criterion for determining the need for competitive service, and, second, they seriously ignore the needs of the traveling public. Although load factors are evidence of the relationship between supply and demand, the Board has repeatedly stated that the load-factor standards established in the *DPFI* were never intended to replace all evidence in route proceedings with respect to the need for competition in particular markets. Those standards merely remain overall industry averages for the purpose of establishing reasonable fares on an industry-wide basis. See Order 71-4-54 at 27-28 and 34-35. Furthermore, adoption of either of National's load factor-related arguments could serve to deprive the traveling public of the benefits of competition under circumstances that would provide a monopolist with considerable incentive to secure windfall profits. Given the fact that the monopolist could manipulate seats offered in a particular market to influence ultimate load factors—as, for example, by scheduling a few flights at unattractive times for one or two months of the year—it is questionable whether competition would ever see the light of day under either of National's hypotheses even if service deficiencies were to develop.

Finally, National argues that competition will result in excessive diversion regardless of the carrier selected. It estimates that Western will divert between $4.7 and 6.7 million in the first year. On a relative basis, however, it indicates that Western will divert less revenue from it than most of the other applicants.[13] Western estimates that it will divert only

[13] National estimates that only Northwest and TWA would divert less revenues from it in the primary market than Western, with Northwest diverting the least (between $4.5 and $6.6 million in the first year). However, according to National's figures it is apparent that the difference in diversionary impact resulting from the selection of either Western or Northwest is very little.

$1.2 million from National in all markets.

The forecasts of National and Western are based on traffic and revenue projections which have been largely outstripped by the passage of time and changed circumstances. Nevertheless, on the basis of more recent officially noticeable data, we find that the range of diversion resulting from Western's competition predicted by National is reasonable.

To compute the diversionary effects of Western's competition we have first estimated what National's share of local O&D traffic plus interline connecting passengers would have been in 1974 had it operated for a full year by applying its historic share (90 percent) to 1974 market figures. We have then increased National's share by 7 percent annually to arrive at its forecast-year traffic (year ending June 30, 1977). We have thereafter compared these totals to National's traffic and RPMs in the same year with the addition of competition by Western. National should retain 50 percent of the total (including stimulated) O&D plus interline connecting traffic in the market. Our computations produce a gross diversion figure of about $11 million.[14] However, we agree with the administrative law judge that it is appropriate to offset this figure by normal traffic growth between the base and forecast years in view of the public benefits that should result from the selection of Western and the fortuitous profits that National has enjoyed as a result of the absence of effective competition in the market since it was first authorized by the Board in 1969. Accordingly, application of "growth-offset" reduces the Miami-Los Angeles passenger revenues that

[14] Based upon National's average 1975 yield per RPM in the Miami-LosAngeles market of about $.058, as reported in updated Exhibit NA-302-I.

Western will divert from National in the first year to approximately $5.8 million. In addition, Western's exhibits show that, at National's current domestic system yield, Western will divert about $750,000 from National in other markets, producing a total diversion of about $6.5 million in passenger revenues.[15]

To be sure, our estimate of diversion is substantial on an absolute basis. We cannot find, however, that the diversionary effect of our award represents a convincing ground for depriving the traveling public of the long-overdue benefits of improved service. In the first place, the evidence is that competition should produce public benefits far outweighing the diversionary impact on National.[16] National is a financially healthy carrier and the operating revenues that may be diverted amount to only a small percentage of its total system operating revenues. There is, in this connection, no evidence that the operations of Western will either significantly impair National's overall financial position or its public service. Furthermore, our estimate of diversion overstates the actual harm to National, because it does not include cost savings that should accompany the loss in revenues, and because

[15] We have assumed for present purposes that $750,000 is a reasonable approximation of the revenue that Western will divert from National in other markets. However, we point out that our review of Western's forecast in light of more recent officially noticeable data and our acceptance of Judge Dapper's downward adjustment of Western's beyond-segment traffic potential, establishes that it is likely that Western will divert less revenues from National in other markets.

[16] We have reached similar conclusions with respect to the diversionary effect of our awards on other carriers. Although Western's operations will have their greatest impact on National, they will also, to varying degrees, divert some additional revenue from other carriers. However, as in the case of National, there is no evidence that such operations will seriously harm any other airline. Overall, the Board finds that the public benefits of the award we make today far outweigh the detrimental impact resulting from the diversion of revenues from other carriers.

it is based only on short-term considerations. Put another way, the record shows that, in the long run, competition should contribute to the further growth and development of the market, and therefore to the economic benefit of both competing carriers. Moreover, in deciding the weight to be attached to the diversion issue, the Board believes that it is important to consider that, although the Board first authorized competition in the market in 1969, none has been effectively provided. As a result, National has been the beneficiary of a market monopoly for more than six years.

3. Standing of the Applicants

Delta argues that it stands in a preferred position *vis-a-vis* the other applicants in this proceeding. It contends that, if the Board determines that there is a need for competitive nonstop service in the Miami-Los Angeles market, Delta must, as a matter of law, be permitted to provide that service. It argues that, aside from what the Boad may have intended with respect to the ultimate disposition of Northeast's Miami-Los Angeles authority, the technical language of condition(13) of its certificate[17] and the technical language framing the issues in the Miami-Los Angeles proceeding establish that the segment in question has been transferred to Delta, subject only to a stay of its operations pending completion of a subsequent proceeding to determine whether there is still a need

[17] The literal language of segment 7 of Delta's Route 27 authorizes the carrier to engage in air transportation with respect to persons, property, and mail "[b]etween the terminal point Miami-Fort Lauderdale, Fla., and the terminal point Los Angeles-Ontario-Long Beach, Calif." Condition (11) of Delta's Route 27 states that "[t]he authority of the holder to operate segment 7 is stayed pending final decision in a proceeding to be hereafter instituted for the purpose of reexamination of such authorization, and this certificate shall be subject to whatever determinations are made regarding segment 7 in such proceeding."

for competitive service in the Miami-Los Angeles market. Therefore, in Delta's view, if the Board reaffirms its previous finding in this regard, Delta must be selected to provide that service, unless the carrier is "decertificated" pursuant to section 401(g) of the Act. However, Delta argues that no such determination can be made on the basis of the present record.

Judge Dapper found that Delta's contentions are without merit. The Board agrees. In our judgment, there is no basis for concluding that Delta retains either a paramount legal or equitable right to, or any other priority claim in, the Miami-Los Angeles nonstop route segment.

To begin with, Delta's current argument ignores relevant decisional criteria, is inconsistent with the positions previously advanced by the carrier, and otherwise disregards fundamental standards of fair play in administrative proceedings. As discussed in great detail above, the *Northeast-Northwest* and the *Northeast-Delta* merger cases were conducted and decided in significant part on the basis of the important principle that since a merger of Northeast would vitiate the basis for Northeast's award of Miami-Los Angeles authority, the segment could not be unconditionally transferred to the merged carrier without further evidentiary proceedings to determine whether the route should be so transferred, awarded to a different carrier, or allowed to lapse. In other words, all interested persons were fully advised that the surviving carrier would have no legal or priority claim to the segment, but would have to compete for the authority with other applicants in a subsequent proceeding. Now, after having received the many other benefits of a merger with Northeast, Delta would have the Board declare that the carrier has a paramount legal right to the segment in question. However, Delta's attempts

to secure reconsideration and reversal of a principle established by the Board to govern Northeast's attempts at merger should not now be countenanced after administrative proceedings have been conducted and decided on the basis of such principle. Indeed, as noted, Delta was a strong supporter of the Board's approach to Northeast's Miami-Los Angeles authority in *Northeast-Northwest*, and later accepted the certificate transferred in the order approving its merger with Northeast.

As previously discussed, Delta's excuse for its self-serving position rests principally on technical language contained in its certificate and in the order instituting this proceeding. Delta also suggests that this language represents a reversal of the Board's position with respect to the ultimate disposition of the Miami-Los Angeles segment. The short answer to Delta's contention is that the referenced language was not intended as such a reversal and does not, even by its terms, constitute such a reversal. In any event, the language must be read in context with the Board's various opinions in the Northeast merger proceeding. To repeat, those opinions clearly establish that the surviving carrier of a Northeast merger would not have priority claim to the Miami-Los Angeles segment, that it would have to compete for this authority with other applicants in a subsequent proceeding, and that any Miami-Los Angeles authority conditionally transferred to the surviving carrier might be finally terminated in such a proceeding.

In any case, the Board has ample power under Sections 401 (g) and 408 (b) of the Act to terminate the Miami-Los Angeles authority that now conditionally appears in Delta's certificate for Route 27. Section 401(g) authorizes the Board, after notice and hearing, to discontinue existing carrier authority (in whole or

in part) by altering, amending, modifying, or suspending existing certificates where the public convenience and necessity so require.[18] The Board has previously explained the nature of its authority under Section 401(g), and the courts have agreed with the Board's views. The Board's ability to alter, amend, modify, or suspend existing certificates is designed to permit the Board to respond to changed economic conditions and circumstances in air transportation by adjusting the operating authority of air carriers. It depends for its exercise upon the requirement of the public convenience and necessity—the same standards under which the Board may grant certificate rights under Section 401 (d) of the Act. See *Southwest Renewal-United Suspension Case*, 15 C.A.B. 61 (1952), aff'd. *United Air Lines v. C.A.B.*, 198 F.2d 100 (7th Cir. 1952); *Intra-Alaska Case*, 28 C.A.B 57 (1958), aff'd. *Alaska Airlines v. C.A.B.*, 285 F.2d 672 (D.C. Cir. 1960); and *Alaska Service Investigation*, Order 71-12-45, aff'd. *Western Air Lines v. C.A.B.*, 495 F.2d 145 (D.C. Cir. 1974). The Board, however, has recognized that its powers under section 401(g) are not unlimited. Thus, it has held that in a situation where it is proposing to alter, amend, or modify a route without a carrier's consent, the alteration must not be such as to transform the essential character of the carrier's operations, and that such alteration should be measured in terms of overall system operations, and not on the basis of the particular route which is involved. See *Alaska Route Modification Case*, 17 C.A.B. 943 (1953); *Inter-Alaska Case, supra;* and *Alaska Service Investigation, supra.*

In our judgment, a Board decision to alter, amend, or modify Delta's certificate for Route 27 so as to re-

[18] Section 401(g) also authorizes the Board to "revoke" existing certificates for intentional violations of the Act, or of the Board's regulations or orders.

move the Miami-Los Angeles authority that now appears therein is consistent with the above-detailed judicially approved administrative standards.[19] For one thing, no party to this proceeding either argues or has shown that the Miami-Los Angeles market either needs or can support more competition than we have authorized herein. In these circumstances, those elements of the public convenience and necessity upon which the Board has relied to select Western as National's new competitor concomitantly support the removal of the Miami-Los Angeles authority that now conditionally appears in Delta's certificate. In addition, such action would not effect a basic transformation of Delta's system by virtually any measure. Indeed, as a practical matter, removal of the segment would have no appreciable economic impact on the carrier's existing operations, since it has never provided service over the segment. Further, it is noted that Delta is a large domestic trunkline primarily serving the eastern and southern parts of the United States, as well as points in Canada, South America and the Caribbean. Consequently, assuming for purposes of argument that Delta was operating over the segment, an examination of its system indicates that the Miami-Los Angeles route mileage forms only a small portion of its total system mileage. Similarly, the 1974 revenues predicted by Delta for the market in question would amount to merely 1.2 percent of its total 1974 revenues.

Finally, aside from the foregoing, Section 408(b) of the Act provides an alternate basis for removing the Miami-Los Angeles segment that now conditionally ap-

[19] Delta contends that the record will not support a "revocation" of its Miami-Los Angeles authority for intentional violations of the Board's regulatory requirements. We agree. However, Delta's contention is beside the point, since, as discussed in the text, the authority in question may be terminated pursuant to other provisions of 401(g).

pears in Delta's certificate. Section 408(b) broadly empowers the Board to approve mergers "upon such terms and conditions as it shall find to be just and reasonable and with such modification as it may prescribe." The Board's decision in the *Northeast-Delta Merger Case* and its order instituting the *Miami-Los Angeles Competitive Nonstop Investigation* specifically preserved the Board's power to terminate the Miami-Los Angeles segment in a subsequent proceeding as a further condition to Board approval of the merger agreement. Delta accepted the certificate as conditioned. The Board shall exercise that power. As shall be discussed shortly, the record in this proceeding establishes that, on balance, the selection of Western would result in greater public benefits than the selection of Delta. The significance of the superiority of these benefits is not, in our judgment, outweighed by other considerations advanced by Delta on brief as relevant to the exercise of the Board's powers under section 408. Further, Delta neither argues nor has shown that any convincing public purpose would be served by continuing in effect subject to a stay the Miami-Los Angeles segment that now conditionally appears in its certificate. In all of these circumstances we have determined that the public interest requires the amendment of Delta's certificate for Route 27 so as to remove segment 7.

In reaching this conclusion, the Board has carefully considered Delta's contention that, if the Board does have authority to deal with the segment in question in a subsequent proceeding pursuant to Section 408, the Board's decisional process must afford Delta's application priority consideration. In support of its argument Delta maintains that Section 408 requires the Board to pass upon the merits of Delta's application before, and independently of, any of the other applications for

Miami-Los Angeles route authority. We do not agree with Delta's reading of Section 408. To begin with, the carrier has provided no precedent for its novel proposition, and we can find none. Moreover, it is clear that it would be inconsistent with the public interest to assess the merits of Delta's application in a vacuum, that is, without granting the applications of the other carriers equal consideration. Thus, for example, the selection of Delta on this basis would, as noted above, deprive the traveling public of benefits that they would otherwise receive by virtue of the selection of other carriers who have presented superior operating proposals.

In sum, the Board has concluded that Delta neither retains a paramount legal right, nor any other priority claim, to the Miami-Los Angeles route segment, and that in these circumstances the merits of its application must be considered on an equal footing with the merits of the other applications now before the Board. Since we have further determined that another carrier should be selected in preference to Delta, and since no convincing reason has been advanced to warrant continuation of its stayed authority to operate the segment in question, we shall remove segment 7 from its Route 27 pursuant to our authority under Section 401(g) and 408(b) of the Act.

4. Carrier Selection

The administrative law judge's selection of Pan American to provide the needed competitive service was premised essentially on two findings: first, he concluded that the carrier's strong international route system would permit it to provide more public benefits than any other applicant; second, he found that Pan American had demonstrated the greatest need for "route strengthening." We agree with Judge Dapper

that the public benefits that each of the applicants can provide is of paramount decisional significance in this case. However, in our judgment, the record establishes that, on balance, Western's selection would provide the traveling public with the most meaningful benefits, and concomitantly, would provide National with the most effective competition.

In comparatively evaluating the presentations of the applicants, we recognize that the choice of a carrier to compete with National is close. We find, as did the administrative law judge, that no carrier has a significant advantage in terms of an historic stake in the market.[20] Furthermore, as we have already explained, the administrative law judge correctly rejected Delta's claim that it acquired an economic stake in the market when it acquired Northeast. An examination of the carrier's exhibits also reveals that no applicant has a significant edge on the basis of equipment to be used or proposed promotional efforts. It also appears that with the exception of Pan American, and to a certain extent Delta, each of the candidates can operate their proposals at a profit. The relative profitability of their various operations is therefore not nearly as important a decisional factor as the public benefits they can provide. For similar reasons, we are in accord with the administrative law judge that the fare proposals of the

[20] Continental is the only applicant authorized to provide single-plane Miami-Los Angeles service. However, according weight to Continental's presence would contravene the Board's determination in the *Southern Tier Case (Houston-Miami Phase)*, Order 73-2-89, p. 4. In any case, the historic participation of any of the applicants in Miami-Los Angeles traffic is very small, and, therefore, not of significant decisional importance. See I.D. at 73. It is true that in 1974 the participation of a number of carriers in Miami-Los Angeles traffic increased. However, it is apparent that these increases are due primarily to transitory traffic gains during National's strike, rather than any fundamental increases in the carriers' economic stake in the Miami-Los Angeles market.

applicants are not controlling under the circumstances of this case.[21]

In these circumstances, our carrier selection decision turns essentially on the public benefits that the applicants can provide, and we are persuaded that Western's service potential is superior to that of the other candidates. As detailed below, the superior benefits resulting from Western's selection are principally the product of the carrier's existing route structure, including its preeminent position at Los Angeles, and the special needs of the Miami-Los Angeles market.

To begin with, the record shows that nearly two-thirds of the traffic in the market originates at Los Angeles or other West Coast cities. National, however, which is the incumbent carrier, has its major strength at Miami. It has only limited route authority at Los Angeles, and no authority beyond Los Angeles.[22] It is significant, therefore, that Los Angeles is Western's largest traffic-generating city and that Western is the most active carrier at Los Angeles. Like National, Western is a financially sound and profitable carrier. Furthermore, the location of Western's main operations base and crew domicile at Los Angeles affords the carrier a high degree of operational flex-

[21] I.D. at 68-70. Judge Dapper found that Continental's proposed economy fare (the lowest basic fare offered by any of the applicants) gives the carrier an edge over the fare proposals of the other applicants. On the other hand, he concluded that Continental's fare proposal is the only advantage of any significance that it has over the other applicants and is not decisive in this case. We agree, and have concluded that on a comparative basis Continental's advantage in this area of carrier selection is outweighed by Western's advantages in service benefits and overall ability to develop the Miami-Los Angeles market.

[22] Western, in contrast, carries more Los Angeles passengers and serves more West Coast cities than any other applicant.

ibility and, coupled with its traffic resources, will permit it to match National's corresponding advantages at Miami. Although Western has little identity in the east and must open a new station at Miami, it should be able to overcome National's initial advantage in this regard without much difficulty, in view of its own competitive strength in the west and its willingness and ability to devote considerable resources toward marketing its service in the east.

Western's position at Los Angeles, and its authority beyond Los Angeles will permit it to provide superior beyond-segment benefits from the outset and, even more important, superior local-market and beyond-segment service in the years to come. As Judge Dapper correctly observed, "with the exception of the benefits Western could confer, the beyond-segment benefits of the other applicants are quite insignificant, at least when measured in relation to the total number of passengers in the principal market herein . . ." I. D. 60.[23] From the outset Western will bring improved single-plane service to approximately 7,000 passengers in the Miami-Seattle market,[24] and single-carrier service to approximately 37,000 Miami-Honolulu/Las Vegas/Portland/Reno/Sacramento/San Diego and

[23] Judge Dapper's reference did not include Pan American which, at the time of the issuance of the initial decision, had proposed, and could probably have provided, even more beyond-segment benefits than Western. However, as we shall explain in detail, Pan American's then apparent advantage in this regard has been eroded by the diminution of its Caribbean operations and, in any event, at no time outweighed Western's overall superiority.

[24] Service in the Seattle market has been characterized by infrequent multistop frequencies. For example, at the present time, Northwest provides a daily two-stop round trip via Chicago and Atlanta. Eastern also offers a four-stop eastbound flight daily and a three-stop westbound flight which departs Miami at 10 PM and arrives in Seattle at 4:30 AM. O.A.G. February 1, 1976.

San Francisco passengers.[25] Although the Board generally attaches more weight to improved single-plane service than to single-carrier service, Western's single-carrier service is an important public-interest factor in the circumstances of this case in view of the high percentage of connecting traffic in the foregoing beyond markets, the absence of single-plane service in the Miami-Honolulu market, and the absence of single-carrier service in the Miami-Sacramento and Miami-Reno markets. Moreover, on a relative basis, the record shows that Western will be able to provide more significant beyond benefits than any other applicant. Indeed, if the administrative law judge's conservative estimate of the level of Western's beyond support traffic is accepted, Western's service proposal offers beyond-segment benefits to nearly twice as many passengers as any other trunk applicant.

Western's advantages in this connection are reflected in its service proposal. In the primary market Western proposes to offer, at the outset, two daily nonstop round trips with wide-bodied DC-10 aircraft. Western's operations are extremely well-tailored to the needs of the Miami-Los Angeles market. One flight will be devoted solely to the needs of traffic between Miami and Los Angeles and will serve no beyond destinations. The other flight will serve only a single beyond destination, Seattle. Both flights are

[25] The traffic estimates are those set out by the administrative law judge, which are not seriously challenged by the other applicants. However, Western's exhibits show far more beyond traffic, and the Board agrees that in view of market growth since the conclusion of the evidentiary hearing and the use of a later forecast year, it is likely that the estimates reflected in the initial decision understate Western's total support traffic. Nevertheless, for present purposes we shall assume that the administrative law judge's estimates are reasonable, since the use of Western's higher figures would not materially affect out conclusions in this case.

timed to provide convenient morning and late afternoon departures from both Miami and Los Angeles and convenient arrivals at both points. The latter permit travelers to make optimum use of connecting flights to points beyond Miami and Los Angeles. In our judgment, Western's proposed primary-market services are comparable or superior to the likely initial operations of the other applicants.

American, Braniff, Delta, and Pan American all propose more daily schedules in the primary Miami-Los Angeles market than the two daily round trips with wide-bodied aircraft proposed by Western. American, Delta, and Pan American each proposes three daily round trips, employing mixture of narrow-bodied and wide-bodied aircraft; Braniff proposes three round trips three days a week and two round trips the other four days.[26] Under other circumstances, this might be a factor favoring these other applicants over Western. We do not find it so here, for several reasons.

First, the more ambitious schedules of the other applicants are to some extent a product of more sanguine forecasts of the growth of the Miami-Los Angeles market. Thus, Delta stated at oral argument[27] that it would probably operate two, rather than three, daily round trips in the forecast year, in view of the

[26] American proposed to operate two of its daily round trips with narrow-bodied aircraft and one with wide-bodied; Delta and Pan American propose one narrow-bodied plus two wide-bodied round-trip flights, Delta with DC-10's and Pan American with the considerably larger B-747's. The differences in proposed scheduling and equipment are reflected in the differences in the number of seats the several applicants propose to the operate annually:

American	328,500	Pan American	633,640
Braniff	331,906	Western	342,248
Delta	463,550		

[27] Oral Argument Tr. at 75, 76, 78.

market's failure to reach the traffic levels that Delta originally predicted would support three daily round trips. We share Delta's evident conclusion. No doubt traffic will in time grow to the point where it will support three daily round trips by the second carrier in the market; but when that happens, Western should certainly be as able as Delta to increase its service offering.

Experience has taught the Board not to place undue reliance on the schedules proposed by applicant carriers for a new route—such schedule promises being essentially unenforceable after the route has been awarded— except where they are solidly backed up by the strength of the applicant's beyond-segment support traffic. Western's strength in this regard is decisively greater than Delta's, and in the long run will insure its ability to provide a greater quantum of service than Delta in the primary market, as well as greater beyond-market benefits.

The same considerations give Western a long-term advantage over both American and Braniff. Although each of these carriers proposes to operate a slightly smaller number of Miami-Los Angeles seats annually than does Western,[28] this fact is more than offset by Western's greater beyond-segment traffic support.[29]

We find Braniff's initial operating plan, on the whole, less attractive than Western's, notwithstanding the additional round trip Braniff proposes three

[28] See *supra*, note 26.

[29] Nevertheless we are prepared to assume that American and Braniff could both operate their initial schedule proposals at a profit. As is evident, our decision herein does not turn on comparative profitability to any major extent, although we do assume, as always, that markedly unprofitable schedule proposals either will not in fact be inaugurated or, if inaugurated, will not long be continued.

days a week. For example, while Western offers conveniently timed morning and afternoon departures from both terminals, Braniff, by contrast, offers no morning departures from Los Angeles and only three morning departures from Miami each week. Moreover, as in the case of Pan American's proposal (discussed hereinafter), Braniff's proposal to extend Los Angeles-Miami flights to a distant international point (Bogota, Colombia, in this case) may well compromise the carrier's ability in comparison to Western to respond to the requirements of the principal market.

On the other hand, American's service proposal does not suffer from the same deficiencies as Braniff's and its schedules appear well-timed for the needs of the local market. Consequently, the greater frequencies it proposes stand as an undeniable point in its favor, to which we have given careful attention. Our ultimate judgment, however, is that this factor favoring American is essentially transitory and is outweighed by the factors which support the selection of Western including: the latter's greater beyond-segment service benefits; its greater traffic support with the long-run advantage this support will inevitably give it in competing with National and serving the local market; the policy of strengthening the smaller carriers in the industry; and, finally, the greater diversion of traffic and revenues which American's greater proposed initial frequencies would probably inflict on National.

In many past decisions the Board has awarded competitive authority in a market, not to the carrier which proposed the greatest immediate number of new flights in the market, but to the carrier whose service would satisfactorily meet the previously unmet needs of the market and would provide other benefits as well. We have found that National's existing service

pattern of two daily nonstop round trips does not fully meet the market's requirements, but it does not follow that five daily round trips are essential.

Given the present size of the Miami-Los Angeles market, the relative predominance of local O&D traffic over beyond-segment flow and interline connecting traffic, the distance and flight time involved, and the excellent suitability of the market for the employment of wide-bodied aircraft, we have concluded that a total of four daily round trips—assuming good coverage of the most desirable departure times, which National's and Western's combined schedules should provide—will in this case represent fully adequate service to the local market for the immediate future.[30] A fifth round trip would be of some benefit to the traveling public, but is by no means essential.

Accordingly, the Board can appropriately give greater weight to the other factors mentioned above, including the negative factor that American's greater initial frequencies would have a greater adverse impact upon the incumbent, National, in terms of diverting revenues and lowering its load factors. In our judgment, an unneeded fifth flight in the Miami-Los Angeles market—and one which, in American's case, would not significantly benefit travelers in other markets— does not justify the sacrifice of the other public benefits and policy objectives which would be entailed in the selection of American. The same considerations apply a *fortiori* to the selection of Braniff or Delta.

We also find that our award to Western is consistent with the Board's historic policy favoring awards to smaller carriers on route-strengthening grounds in

[30] In the long run, as previously pointed out, Western's greater pool of beyond-segment traffic support will enable it to surpass the other applicants in competing with National and service the needs of the market.

close cases. This policy affords the smaller applicants in the case—Braniff, Continental, and Western—some advantage over the larger trunk applicants, *i.e.*, American, Delta, Eastern, Northwest, Pan American, and Trans World. However, in the circumstances presented, route strengthening, although favoring a smaller carrier in general, is not decisive in choosing among the smaller applicants.[31] Each of the three smaller carriers argues that it has the greatest need for Miami-Los Angeles authority, and each persuasively relies upon various carrier-strengthening criteria in support of its contention. Consequently, it is not surprising that the record shows that it is a close question as to which of these carriers would benefit most from route strengthening. Thus, to the extent, if any, that either Braniff or Continental may benefit from strengthening more than Western, we cannot find that the benefit is of sufficient magnitude to outweigh Western's advantage in terms of public-service benefits.

Having determined that Western will offer the traveling public substantial service benefits, we now consider whether Western can operate profitably—not necessarily more profitably than any other applicant, but profitably enough to sustain the service it

[31] Judge Dapper found that the route-strengthening criterion favors Pan American's selection, for reasons principally relating to that carrier's financial difficulties. However, "route strengthening," as traditionally perceived by the Board, pertains to the Board's policy of allowing smaller carriers to grow at a faster rate than larger carriers in the interest of industry balance and the creation of a more viable air transportation system as a whole. Pan American, of course, is one of the largest carriers in the industry, particularly in terms of assets, revenue passenger-miles, length of hop and length of haul; and indeed, its recent financial improvement appears to be related to its retrenchment efforts. Thus, on a comparative basis, it has no claim to the Miami-Los Angeles route on the grounds of the "route strengthening" criterion. Furthermore, we cannot conclude that Pan American's alleged need for "new profit opportunities" should be accorded more weight than the superior service benefits that Western will bring to the Los Angeles-Miami market.

proposes and to strengthen the carrier. Western estimates that its proposed Miami-Los Angeles operations will produce operating profits ranging between $2.4 and $4.5 million, depending upon various costing assumptions. Western's forecasts, like the forecasts of other applicants, are somewhat outdated due to changes in both the revenue and cost elements since the close of economic hearings. Nevertheless, it is clear that the Miami-Los Angeles route will be profitable for Western. In this connection, we have estimated that Western will transport approximately 189,300 Miami-Los Angeles passengers in the first year. Of these, approximately 145,480 will be local and interline connecting passengers and 43,800 will be beyond-segment passengers. Assuming, therefore, that Western offers 342,248 annual seats as reflected in National's exhibits, Western should be able to operate its flight at average load factors of about 55 percent. There can be no dispute that this figure is substantially above the carrier's break-even estimate for its proposed Miami-Los Angeles operations, and hence, demonstrative of the profitability of Western's service.

In sum, we have determined that Western should be selected on the basis of those carrier-selection criteria which we have found to be the most significant in the circumstances of this case. In reaching this conclusion, we have given careful consideration to the administrative law judge's conclusion that Pan American should be selected as the preferred candidate, and we appreciate that on the surface Pan American's selection might seem warranted on the basis of some of the same factors that have led us to select Western. Thus, the initial decision indicates that Pan American would provide more service in the primary market (three daily nonstop round trips to Western's two), would provide more capacity (633,640 annual seats to Western's 342,248), and would convenience nearly

three times as many beyond-segment passengers as Western, although this final consideration has been weakened considerably by subsequent events. Nevertheless, we have concluded that, on balance, Western is the superior choice.

To begin with, the principal focus of this proceeding is on the need to provide the Miami-Los Angeles market with improved air transportation. In this setting, and after weighing the merits of each carrier's service proposal, we believe that Western's is superior to Pan American's in this regard. In the first place, as already noted, we have concluded that Western's two daily round trips, when added to National's present two, will adequately meet the needs of the local market, and that a fifth round trip is not required. The nearly 300,000 additional seats per year proposed by Pan American are likewise not needed for the local market.

Moreover, the facts are that Pan American proposes to use the Miami-Los Angeles segment, in significant part, as a transcontinental bridge, linking points as far as 10,000 miles apart. In fact, pursuant to Pan American's service proposal, Miami-Los Angeles would be only one leg of extremely long transoceanic flights originating at Honolulu and the Orient and terminating at Miami or points east of Miami.[32]

[32] Pan American's proposed single-plane service via the Miami-Los Angeles segment, and the approximate airport-to-airport mileages involved here, are as follows:

Market		Distance (miles)	Market		Distance (miles)
Miami-Honolulu	—	5000	Los Angeles-Bahamas	—	2400
Hong Kong	—	9600	San Juan	—	3400
Auckland	—	8800	Lisbon	—	6500
Melborne	—	10300	Madrid	—	6800
Papeete	—	6400	Rome	—	7500
Sydney	—	9800			
Tokyo	—	7800			

Because of the great distances and numbers of stops involved, Pan American's schedules realistically invite on-route flight delays and operational disruptions, which could compromise the value of its service in the local market. Pan American's own experience in providing time Honolulu-Los Angeles service is illustrative of this point. Pan American serves the market largely by flights originating and/or terminating in Japan or the South Pacific. In 1975, only 43 percent of these flights arrived at Los Angeles on time. Its overall on-time performance in the market was only 60 percent.[33] Indeed, because of the great number of beyond-terminal points which Pan American claims would feed and support its high-capacity service, Pan American's proposal runs an even greater risk of subordinating the needs of Miami-Los Angeles passengers to the dictates of its international beyond markets. This risk is increased by the fact that Pan American must unavoidably be attentive to the needs of its beyond markets since, as the carrier concedes, the economic feasibility of its service proposal depends wholly upon its ability to attract massive beyond traffic over the Miami-Los Angeles "bridge." By contrast, Western's proposed combination of turnaround and through-plane flights serving a single beyond point (Seattle) poses none of these problems and demonstrates that Western is in a far better position than Pan American to attend to the developing travel requirements of the local market.

Pan American's long-haul operations also reduce the carrier's ability to provide National with as effective a competitive catalyst as Western's operations should provide. It is reasonable to assume that National will continue to operate turnaround service in

[33] From figures reported to the Board by Pan American on CAB Form 438, "Monthly Report of Schedule Arrival Performance on Designated Passenger Flights."

the Miami-Los Angeles market. Consequently, National will be in an excellent position to adjust schedules and capacity to the changing demands of the market, and for that matter, to offer service that closely conforms with posted arrival and departure times. On the other hand, Pan American's long-haul flights, which, as noted, all originate at points beyond the local market, deprive the carrier of National's operational flexibility and ability to insure reliable schedules, thereby reducing somewhat the carrier's competitive effectiveness. Again by contrast, Western's service proposal does not suffer from Pan American's operational impediments, and, as discussed, Western is otherwise in a paramount position to compete with National.

In short, we have concluded that Western will be able to provide service that is both more responsive to the needs of the local market and better able to provide National with a long over-due competitive stimulus. In view of the importance that we attach to these considerations in this case, we must find that Western's strong points outweigh Pan American's ostensible advantage in providing more primary-market service.

Additionally, our examination of the record and more recent officially noticeable data establishes that Pan American will not be able to capture enough beyond-segment traffic support to operate its proposed three daily round trips on a profitable basis. In these circumstances, Pan American's advantage in proposing more initial service appears to be largely academic. More specifically, Pan American estimated that it would be able to flow 163,100 beyond-terminal passengers over the Miami-Los Angeles segment. The deficiencies in Pan American's beyond-segment forecasts were recognized in part by Judge Dapper, who re-

duced Pan American's estimates by 19 percent, to 132,250 passengers. However, we share the uniform judgment of all of the other applicants that Judge Dapper's estimates still seriously overstate the support traffic that Pan American is in any way likely to obtain.

In the first place, actual experience since the initial decision was issued demonstrates that the growth estimates used by the administrative law judge were generally too high, and that traffic in many contributory markets has not reached predicted levels. In this connection, the Board's O&D Surveys indicate that the shortfall between the actual overall size of the affected markets in 1974 and the administrative law judge's estimates for that year is 20 percent. Thus, even giving due consideration to the markets' potential for future growth, it is apparent that the substantial pool of traffic that the administrative law judge found would exist to support Pan American's service must be significantly reduced. Secondly, we must conclude that his stimulation and participation estimates were also excessive in relation to the nature of Pan American's proposed single-plane beyond-terminal operations. Our difference with the administrative law judge in this connection stems principally from our firm belief that the value of Pan American's proposed single-plane flights will be compromised to a far greater extent than anticipated in the initial decision by the extremely long-haul nature of the carrier's proposed service in many markets. For example, Pan American has proposed single-plane or single-carrier service between Miami and a number of points in the Orient, including Tokyo and Hong Kong. Judge Dapper found that Pan American's flights would stimulate the Miami-Orient markets by 50 percent; that Pan American would capture 75 percent of the total

traffic; and that, as a result, Pan American would be able to flow approximately 12,000 annual Miami-Orient passengers over the Miami-Los Angeles segment. However, a Miami-Hong Kong flight would have an elapsed time of about 23 hours, and a Miami-Tokyo flight one of about 17 hours. Realistically, few travelers can be expected to endure continuous journeys of this magnitude. Rather, it is much more likely that they would choose to break their journeys at such attractive stopover points as Honolulu, Los Angeles, or San Francisco. These considerations significantly reduce the stimulative value of Pan American's proposed service. At the same time, they increase the possibility that Pan American will lose Miami passengers to other carriers for at least a portion of the complete trip. Consequently, a significant downward adjustment must be made to the administrative law judge's stimulation and participation estimates in these markets, and hence to the Miami-Orient traffic that Pan American would actually be able to flow over the Miami-Los Angeles segment. Similar considerations apply to the Pacific-South American "bridge" markets, the Miami-South Pacific markets and, to a lesser extent, to the Los Angeles-Iberian Peninsula markets and the Honolulu-Miami market.

Moreover, many circumstances have changed since the close of the economic hearings in 1973, including substantial alterations in Pan American's route structure and service patterns. These changes fatally undermine Pan American's asserted ability to flow enough traffic over the Miami-Los Angeles segment to support its proposed level of service. The heart of the matter is that since the close of the hearings Pan American has been in the process of giving up certain of its existing service obligations as part of a worldwide

retrenchment program designed to restore economic health to the financially ailing carrier. Pan American's retrenchment has resulted in the total elimination or significant reduction in service in markets that were to have provided essential contributory traffic for its Miami-Los Angeles operations. For example, the record shows that Pan American's ability to flow traffic over the Miami-Los Angeles "bridge" between Los Angeles, other West Coast points, and numerous points in the Pacific, on the one hand, and points in the Caribbean, on the other, is crucial to the viability of its service proposal. Indeed, the initial decision reveals that such traffic represents approximately one-half of Pan American's total backup support. However, much of the forecast traffic is no longer available as a result of Pan American's suspension at many important Caribbean points. Further, apart from the total elimination of service, Pan American has also substantially reduced its beyond-terminal operations which were to feed its high-capacity service proposal. It is of course possible for Pan American to restore service in the future. However, there is no way to accurately discern from this record whether, and to what extent, Pan American will be able or willing to do so.

It is our conclusion that as a result of the cumulative effect of the overstatements that we have found extant in traffic forecasts for Pan American and the changes to its beyond-terminal services since the conclusion of the evidentiary proceedings, Pan American will not be able to realize, at the outside, more than 50 percent of the beyond-segment traffic support predicted by Judge Dapper, or about 65,000 passengers annually. Even this figure, in our judgment, is in all likelihood too optimistic by an appreciable margin, but we accept it for present purposes. The loss of this forecast sup-

port traffic would fatally impair Pan American's ability to operate its proposed three daily round trips on a profitable basis, and consequently vitiates any basis for selecting Pan American in preference to Western.

5. The Proposal to Certificate Pan American as a Third Carrier

At this point it is appropriate to comment on the proposal made in the separate statement of the Chairman and Vice Chairman. Our colleagues agree with the Board's unanimous conclusion, set forth above, that Western should be selected in preference to Pan American and all the other applicants as the primary new carrier in the Miami-Los Angeles market to compete with the incumbent carrier, National. They go on to propose, however, that Pan American should nevertheless be awarded temporary, permissive authority as a third competing carrier in the market, so as to allow it to attempt to provide the service benefits in the international beyond-terminal markets which are its principal claim to primacy in this case.

It should be pointed out, at the outset, that neither Pan American nor any other party in this proceeding has ever suggested that the Miami-Los Angeles market needs, or can presently sustain, the services of three nonstop carriers, particularly where all propose to operate wide-bodied aircraft. The market is large, but not that large by a considerable margin.

Our colleagues do not wish to cripple Western's newly authorized service in the market, and hence propose an international long-haul restriction on Pan American's third-carrier authority, requiring any Miami-Los Angeles flight to serve a point west of Honolulu. They assume, no doubt correctly, that this restriction would as a practical matter limit Pan American's Miami-Los Angeles service to a single daily

round trip, so that the three carriers in the market would between them operate a total of five such round trips.

We have already recorded our conclusion that four well-timed round trips will fully meet the present service needs of the local Miami-Los Angeles market, and that a fifth round trip is not required. We have also pointed out the detrimental effects of a fifth round trip in unnecessarily increasing diversion from the incumbent carrier, National. Here, of course, Pan American's single flight would also divert traffic and revenues from Western's new service, though probably not to a fatal extent. A further drawback our colleagues do not address is the question of how Pan American could hope to acquire substantial identity in a market in which its service was so limited and restricted.

Ultimately, however, as we see it, the fundamental flaw in our colleagues' proposal is that there would appear to be no realistically likely way in which Pan American could hope to operate the suggested additional round trip on a profitable basis. For present purposes we would concede, *arguendo*, that a fifth nonstop round trip by another carrier might perhaps stimulate the local market a little further, say by an additional five percent; and that the percentage of travelers patronizing nonstop flights might also go up, say, from 90 to 95 percent. This might bring the forecast-year nonstop market to as many as 319,915 annual passengers.[34] Passing over Pan American's severe market-identity problem as a restricted third carrier in the market, and the impact of its extreme-long-haul operations on the reliability of its schedules,[35] we would also for present purposes concede it a *pro rata* one-fifth share of the local market, or 63,983 annual passengers,

[34] Compare fn. 9, p. 8, *supra*.
[35] Discussed *supra*, p. 22.

though in reality it is hard to imagine how it would achieve this level of market penetration.

However, Pan American's reduction to a single daily flight would also markedly reduce the beyond-terminal traffic it could hope to carry over the Miami-Los Angeles "bridge" segment. Our previous maximum figure of 65,000 annual beyond passengers (*supra*, p. 25) was premised on three daily round trips. With only one round trip—and taking into account the fact that some of Pan American's claimed beyond-segment traffic would now be afforded competitive single-carrier service by Western (*e.g.*, in the Miami-Honolulu market)—we simply do not believe that Pan American could hope to retain more than 42 percent of the above-forecast beyond passengers, or 32,500 annually.[36] The net result is the following unattractive picture of three-carrier operations in the Miami-Los Angeles market:

Carrier	Round Trips	Local Traffic	Beyond Traffic	Total Traffic	Annual Seats	Load Factor
National	2	127,966	21,822	149,788	356,269	42%
Western	2	127,966	40,300[a]	168,266	342,248	49%
Pan American	1	63,983	27,700	91,283	257,544[b]	35%
Total	5	319,915	89,422	409,337	956,061	43%

[a] See p. 8, n. 9, *supra*, reduced by 3,500 Miami-Honolulu passengers (to PAA).

[b] 360 seats (B-747) × 2 × 365 days × 98% performance factor.

These figures raise the question of whether there is any adequate public-interest justification here for pushing National's load factor down to 42 percent or Western's to 49 percent. Unlike our colleagues, we cannot conclude that Pan American's services as a

[36] By optimum timing of its single daily round trip Pan American could hope to retain more than one-third, but not as much as one-half, of the beyond passengers it might (optimistically) garner with three round trips. A figure of 42 percent represents a reasonable compromise estimate, in our judgment.

third carrier in the market would be sufficiently beneficial to warrant these results, notwithstanding our earlier conclusion that load factors are by no means the sole criterion to be observed in competitive route cases.

Even if we thus assume that National's and Western's operations would not be rendered unprofitable, it has not been the Board's policy to introduce a third carrier into a market where the basic benefits of competition have already been (or are simultaneously being) established by the certification of a second carrier, merely for the sake of further competition. Rather certification of a third competitive carrier, and the consequent diversion of traffic and revenues from the first two carriers, has depended on findings either of serious actual or prospective deficiencies in the services provided by the first two carriers or substantial public benefits which can be achieved only by the third carrier's certification. Here, we cannot find (nor do our colleagues suggest) any prospective deficiencies in the combined services of National and Western, nor can we find sufficient justification for a third-carrier award in the form of public benefits that Pan American alone can provide.

As we have previously noted, the significance of Pan American's asserted single-plane service benefits is diluted in many instances by the extreme distances involved, which makes it likely that a stopover or change of plane would be desired by many travelers in any event. Similarly, the carrier's claimed benefits of single-carrier service are diluted by the difficulty in arranging convenient flight connections for all the origins and destinations involved when only a single daily round trip over the "bridge" segment will be possible. In sum, we cannot find the public benefits stemming from an award to Pan American, viewed in the most

favorable light, as adequate to offset the adverse impact of such an award on National and Western and on their future ability to respond to the needs of the local market.[37]

A final pressing question is whether the public interest would be served by awarding Pan American a new route under conditions where it could hope to achieve no better than 35 percent load factor on a single daily round-trip flight. We are strongly of the view that it would not. As Western has shown,[38] Pan American's exhibits at the hearing imply a break-even-load factor of 37.7 percent for its Miami-Los Angeles operations. This figure is suspect, since it was and is far below the carrier's overall system break-even load factor. Moreover, the 35 percent load factor we have calculated for Pan American's single daily round trip is very much a maximum, since we consider quite optimistic both the assignment to it of a full 20 percent share of the local nonstop traffic and the retention on a single daily flight of as many as 27,700 of its originally claimed beyond-segment passengers. Thus it is evident to us that Pan American's revenues from its service would almost certainly not even cover its operating expenses, let alone make any contribution to the very substantial costs of the capital it would be required to employ on the route. Taking into account capital costs, the route would we believe unquestionably be a loser for Pan American.

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[37] We do not believe that the Board's recent Omaha-Chicago third-carrier award to Frontier in the *Reopened Service to Omaha and Des Moines Case*, Order 75-9-19, September 8, 1975, is comparable to the third-carrier award to Pan American proposed by our colleagues here. In that case, the award to Frontier will enable it to provide first single-plane and single-carrier service to Chicago for numerous cities on its system not served by any other carrier, over distances at which such single-plane and single-carrier service is far more significant than in Pan American's case.

[38] Brief of Western to the Board, p. 24 n. 1.

In the past few years Pan American's financial losses have been little short of disastrous. Its recent more heartening results were undoubtedly in large part the product of a rigorous campaign of corporate and service retrenchment, a major feature of which has been the carrier's withdrawal from unprofitable markets and suspension of unprofitable services. Thus, for example, Pan American has completely pulled out of the ultra-dense New York-San Juan market, where it found it could not compete profitably with two other carriers despite its long history and unrestricted authority in the local market and its unmatched route strength beyond both terminals. How then can our colleagues expect Pan American to succeed as a new, temporarily authorized, hopelessly restricted third carrier in the much smaller Miami-Los Angeles market, where the beyond-terminal traffic support for its single daily round trip would realistically be so much less?

If there is anything Pan American does *not* need at this time, in our judgment, it is another new route award to be operated at an economic loss, as this one undoubtedly would be.[39] It is pointless to say that the authority would be merely permissive; in reality, Pan American would be under great pressure to operate the route, at least for a while, and the losses it would suffer would undoubtedly be substantial, particularly

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[39] See the dissent of Members Minetti and Murphy in the *Chicago/Atlanta-Jamaica Service Investigation*, Order 72-4-150, pointing out the fallacy of attempting to "strengthen" Pan American by awarding it new routes that cannot be operated at a profit. There, as here, Pan American already served both terminals (Chicago and Jamaica) of the new route it sought, and promised all sorts of beyond-segment service benefits and operational efficiencies. After a relatively short time, however, the carrier was forced to suspend service over the route, and today has dropped or is seeking to drop most of its service at both Chicago and Jamaica.

in relation to its still-weak financial condition.[40] Moreover, we are unaware of any Board precedent for a route award, permissive or not, to a financially weak carrier where it is reasonably clear that the route will be unprofitable, where the carrier is plainly in no shape to sustain years of losses while "developing" the market, and where the public-service benefits relied on to sustain the award are as weak and insubstantial as those here. Congress in its wisdom may legislate for "freedom of entry" and indeed for total deregulation of air transportation, but while the governing statute remains as it is we cannot see a proper or convincing basis for our colleagues' proposed third-carrier award to Pan American.

6. Proposed Restructions

Certain applicants urge the Board to prohibit single-plane service by Western in the Miami-Seattle market and in the Miami-Honolulu market. We have concluded that the imposition of either of the foregoing restrictions would not be in the public interest.

Braniff leads the way in advocating a restriction pending single-plane service in the Miami-Seattle market. Braniff does not raise *Ashbacker* contentions, nor claim that it would suffer serious diversion if the restrictions are not imposed. Rather, Braniff argues that it would be unfair for the Board to permit single-plane service in the Miami-Seattle market, since the Board restricted Braniff from providing such service in the 1969 *Southern Tier Case*, *supra*. The Board does not agree.

To begin with, the Board's action with respect to

[40] We cannot ignore the fact that the carrier has a multimillion-dollar subsidy petition pending. Our colleagues have not indicated whether they would make their permissive award to Pan American explicitly ineligible for subsidy.

Braniff in the *Southern Tier Case* was based in significant part on a determination that that proceeding did not provide the appropriate forum for considering Braniff's proposed Florida-Pacific Northwest service.[41] It is clear that the Board focused on two interrelated considerations in reaching that result. First, Braniff has proposed a broad range of single-plane service in the Miami-Seattle, Miami-Portland, Tampa-Seattle, and Tampa-Portland markets. Second, Eastern and Northeast had at that time shown strong interest in the subject markets by applying for an improvement in their own Florida-Pacific Northwest operating authority.[42] The confluence of these factors indicated to the Board that the question of the need for new or improved service in the four markets encompassed by Braniff's considerations might better be handled in a separate proceeding. These considerations do not apply here. Unlike Braniff, Western has proposed single-plane service in the Seattle-Miami market only. Significantly, Braniff does not dispute Western's contention that the record in this case establishes that such service would add to the convenience of the traveling public without adversely affecting any other carrier. Moreover, the Board has, subsequent to *Southern Tier*, dismissed the applications of Eastern and Northwest.[43] Although such action was without prejudice to refiling, neither carrier has done so. In these circumstances, we cannot find that our decision in *Southern Tier* requires the adoption of Braniff's proposed restriction against single-plane service in the Miami-Seattle market.

[41] See Order 69-9-111, at 6.

[42] Northwest at that time had on file a Subpart N application for authority to overfly segment junction points on its route in the Seattle/Portland/Spokane/Atlanta/Tampa/Miami markets — an application later dismissed in Order 69-11-14, November 4, 1969.

[43] See Orders 69-11-14, *supra*, and 73-1-56, dater November 4, 1969 and January 18, 1973, respectively.

In short, we cannot find that a restriction on Western's ability to tack its Miami-Los Angeles award with its existing Los Angeles-Seattle authority is required by either legal considerations or the public interest. However, the Board is not insensitive to the elements of equity in Braniff's argument, and accordingly has decided that it would be receptive to applications by Braniff and/or the other carriers whose Miami-Seattle/Portland tacking authority has heretofore been restricted (Continental and Eastern) for relaxation of those restrictions. In such a proceeding, Western will not be entitled to claim any priority of right on the basis of our decision not to attach a single-plane Miami-Seattle restriction to its award here. In other words, in arguing for improvement of their Miami-Seattle/Portland authority, all carriers will be in exactly the same position as if we had acceded to the request to restrict Western's authority. We believe that the requirements of equity will be fully satisfied by this treatment.

Finally, we agree with the administrative law judge that it would be inconsistent with the public interest to prohibit single-plane service in the Miami-Honolulu market. I.D. at 100-101. In this connection, we have considered American's contention that an award in this case would undermine the balanced Hawaii route pattern established by the Board in the *Transpacific Route Investigation, 51 C.A.B. 161,264 (1969)*. It appears that American's primary concern is that an award of Miami-Los Angeles authority could have an unsettling effect upon competition in the Mainland-Hawaii markets generally, and in the Los Angeles-Honolulu market particularly. We do not agree. In *Transpacific*, Western was awarded Mainland-Hawaii authority subject to a condition precluding the carrier from providing turnaround service in the market; *viz.*, Western's authorization was made subject to restrictions requiring Western to serve a point east of California on all of its Los Angeles-Hawaii flights. An award of Miami-Los Angeles authority in this case is, of course, consistent with the restrictive nature of Western's Los Angeles-Hawaii authority. Moreover, there is no basis for concluding that extension of Western to Miami will upset the competitive balance as feared by American. We believe that the Miami-Honolulu market is too small to have a significant impact on existing competitive relationships, even allowing for future growth and expansion of the market. Thus, in 1974, the Miami-Honolulu market generated only about 12,500 O&D and interline connecting passengers, or only 17 passengers a day in each direction. Although Western could operate single-plane Miami-Honolulu service by tacking its award in this case to its existing Los Angeles-Honolulu authority, it has not proposed to do so.

7. Continental's Motion to Reopen the Record

As touched on at the outset, the focus of Continental's motion is specifically on Continental's contention that changed circumstances since the conclusion of the economic hearings undermine the evidentiary basis for Judge Dapper's selection of Pan American. Continental does not contend that the record is insufficient to support an award to any other applicant, including Western."[1] Since the Board has decided against selection of Pan American, there is no need to reopen the record on this point.

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[1] As counsel for Continental explained at oral argument: "As to Continental and the other carriers in this case, I don't think that there is any significant change in the carriers' positions, other than Pan American, that would affect carrier selection other than the fact that we are already in Miami, something you can take notice of. And, in fact, we show a profit of $5 million on this route . . . . But as to Pan Am, if the Board were of a mind to award the route to Pan Am, then it would have to reopen the record." Oral Argument Tr. at 52-53.

In addition, Continental contends that the record should be reopened to consider Continental's increased participation in the Miami-Los Angeles market since the initial decision was issued. There is no need to reopen the record on this basis. As discussed at p. 16, Continental's participation in Miami-Los Angeles traffic is not a decisional significant consideration.

8. Environmental Considerations

A. The National Environmental Policy Act of 1969 — BOR's Environmental Analysis

As noted earlier, BOR has submitted an Environmental Negative Declaration, in the form of an "environmental assessment," concluding that an award of route authority in this case would not constitute a major Federal action significantly affecting the quality of the human environment, and that therefore an "environmental impact statement" under section 1002(2)(c) of NEPA is not required. No party has disputed this conclusion.

The Board has reviewed BOR's environmental assessment. We find that we are in full accord with BOR's NEPA conclusions, and adopt its statement as our own.

B. The Energy Policy and Conservation Act of 1975 — National's Motion

National did not contest the Bureau's NEPA conclusions. However, on January 6, 1976, National moved to defer further procedures in this case pending an investigation of the "probable impact of energy efficiency and energy conservation." National asserts that the Energy Policy and Conservation Act of 1975 (EPACA) imposes new procedural requirements on the Board which are applicable in this case and which require a rule-making proceeding and preparation of an "energy impact statement" before a final decision

can be issued. Continental, Pan American, and Western have filed answers in opposition to National's motion. Delta has also filed an answer stating that the new statute would have no bearing on its selection since it is already an incumbent in the market. The Board has decided to deny National's motion.

EPACA was signed into law by President Ford on December 22, 1975. The new statute establishes national goals and programs for the conservation and more efficient use of petroleum products.[45] The Board's responsibilities under EPACA are outlined in Section 382 thereof. Section 382(a) requires the Board (and other regulatory agencies) to study and report to Congress on (1) energy conservation policies and practices which the Board has instituted subsequent to October, 1973, and (2) "any requirement of any law" administered by the Board or "any major regulatory action" which the Board determines promote or perpetuate inefficient use of petroleum products or other forms of energy. Section 382(a) also requires the Board to:

> ". . . report to the Congress with respect to the content and feasibility of proposed programs for additional savings in energy consumption by the persons regulated by each such agency which have as a minimum goal a 10 percent reduction, within

[45] The Conference report accompanying the new legislation indicates that EPACA is designed to achieve two major objectives:

> "In the short term, the Act is designed to reduce the vulnerability of the domestic economy to increases in import prices, and to insure that available supplies will be distributed equally in the event of a disruption of petroleum imports.
>
> "For the long run, the Act will decrease dependence upon foreign imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford." Conference Report, H.R. 94-700, 94th Cong., 1st Sess., December 9, 1975, p. 117.

> 12 months of the institution of such programs, in energy consumption from the amount of energy consumed during calendar year 1972, including any legislative recommendations each such agency finds are necessary to achieve such goals."

In addition, Section 382(b) states that the Board shall:

> ". . . where practicable and consistent with the exercise of [its] authority under other law, include in any major regulatory action (as defined by rule by each such agency) taken by each such agency, a statement of the probable impact of such major regulatory action on energy efficiency and energy conservation."

National interprets Section 382 to require the deferral of all procedural steps in this case until the Board institutes and completes rulemaking proceedings to define the term "major regulatory action" and to establish appropriate regulations for the development of energy impact statements. National argues that the legislative history of the new statute establishes that the Board must ultimately find that this route proceeding consitutes a "major regulatory action" within the meaning of Section 382(b), and, therefore, that the Board must include an energy impact statement in any final decision issued in this case. National also maintains that Section 382(b) requires additional procedures in this case *after* the rule-making proceeding is completed to elicit further comments and information necessary to the preparation of the impact statement.

The thrust of National's motion is plain: there must be yet another lengthy delay in this proceeding before the Board can take action to provide Miami-Los Angeles travelers with the benefits of competitive service.

Moreover, if EPACA requires the Board to reopen the record or to otherwise delay a decision in this case in the form and manner alleged by National, it follows that EPACA also requires the Board to take similar action in other pending route proceedings which could have a comparable, or greater, impact on energy conservation and efficiency. In other words, National's interpretation of the statute would require the Board to impose a moratorium on route authorizations in all ongoing major cases.

We do not agree with National's interpretation of the statute. In our judgment, Section 382 may be reasonably construed as requiring the Board to focus on the need to promote energy conservation and efficiency in the air transportation industry as additional factors in its overall analysis of the public convenience and necessity in this proceeding. It also requires the Board to institute a rulemaking proceeding relating to the definition of "major regulatory action." On the other hand, our reading of the language of the statute and the relevant legislative history establishes that EPACA does not require the Board to defer and delay its decisions pending the completion of such proceeding and the preparation of energy impact statements where, as here, such action would be inconsistent with the Board's basic statutory responsibilities, including the duty to authorize competition where the Board has found competition to be required, and to decide route applications "as speedily as possible." Balancing these considerations in the special circumstances of this case, we have concluded that the terms and requirements of EPACA provide the Board with ample flexibility to use energy conservation and efficiency on the basis of the existing record, while the Board proceeds with the rulemaking proceeding contemplated by EPACA.

National makes general reference to the above-

quoted section of 382(a) in support for its position. However, that section requires the Board to review and report to Congress on the "content and feasibility" of industrywide fuel conservation programs. It does not state that the Board must immediately cut back industry fuel consumption 10 percent below 1972 levels. More importantly, it certainly does not state that the Board may not authorize necessary additional air transportation services while it considers industrywide efforts at fuel conservation and efficiency. In short, we agree with Pan American's contention that moving forward with this case is not inconsistent with 382(a).

Section 382(b) requires "a statement of probable impact" only where a "major regulatory action" is involved, and only where the issuance of such a statement would be "practicable and consistent" with the Board's responsibilities under the Federal Aviation Act. National's contention that this case constitutes a "major regulatory action" as a matter of law under EPACA is unconvincing.[48] However, even assuming for present

[48] National's only support for its contention is a reference to the following statement in H. Rep. No. 94-340 at 75:

> "Transportation industries are energy intensive. Commercial transportation industries are almost without exception subject to regulatory supervision by Federal agencies. The Civil Aeronautics Board regulates airline routing and schedules. The Interstate Commerce Commission regulates operations of interstate motor truck carriers and railroads. The Federal Maritime Commission regulates the shiping industry. The policies of each of these agencies has a direct influence upon energy consumption."

In our judgment neither this statement nor anything else in the House Report reasonably supports a conclusion that a single route case such as included herein must necessarily be considered a "major regulatory action" under EPACA. Section 382(b) clearly states that Congress has vested in the Board the discretion to define "major regulatory action" by rule. We can find nothing in the legislative history which compromises this specific delegation of Congressional authority, in the manner argued by National.

purposes that our decision amounts to a "major regulatory action," it is nevertheless clear that Section 382 does not require a statement of probable impact in this proceeding. In our judgment, special circumstances exist herein which demonstrate that deferral and delay for the preparation of an energy impact statement as requested by National would not be "practicable and consistent" with the Board's basic statutory responsibilities. First, we have found that the Miami-Los Angeles market requires, and has long suffered from, the absence of competition. It is worth recalling in this connection that although the Board first authorized competition in 1969, none has been effectively provided. Second, this case has, regrettably, been plagued with extraordinary delay. There can be little question that further protracted litigation would seriously inconvenience and burden the traveling public and interested parties. In short, we believe that there is an overriding public need for an immediate decision in this proceeding, and that further delay in authorizing the services that we have found to be required by the public convenience and necessity would be manifestly inconsistent with the Board's ongoing responsibilities under the Federal Aviation Act.

Moreover, we are satisfied that further procedures as suggested by National are not required to permit a fair assessment of the impact of a decision in this case on energy conservation and efficiency in the air transportation industry.

The quantities of aviation fuel which would be used during the forecast year by each of the carrier applicants on implementation of their operating proposals have already been determined and analyzed in BOR's environmental assessment. BOR calculates that on the annual basis Western's operations would require 16.5 million gallons of fuel. Based upon these figures BOR

concludes that although each of the proposals would require a substantial quantity of aviation fuel on an absolute basis, the total fuel consumption is small in comparison to the 7.8 billion gallons of fuel consumed in Calendar year 1972 by the certificated scheduled carriers in domestic operations. In fact, BOR noted that Western's proposal would require a quantity of fuel equivalent to .21 percent of total 1972 consumption.

We recognize that the fuel requirements involved in our decision are not inconsequential. However, we agree with BOR that fuel consumption should be properly considered on an industrywide basis. Thus, we construe our statutory responsibilities to insure that national fuel conservation efforts as they pertain to air transportation should, to the extent feasible, be borne equally by all segments of the air transportation system. Fuel conservation efforts should not deprive particular communities of needed service simply because that service has not been operated before. Viewed from this perspective, it is clear that the impact of our award on fuel conservation is not significant, and is outweighed by previously detailed air transportation considerations requiring the certification of Western.

Similar conclusions apply to the question of fuel efficiency. National argues that competition in the Miami-Los Angeles market will result in low overall load factors which are indicative of an inefficient utilization of fuel resources. However, the focus of National's contentions is again too narrow. The question presented is not the impact of our action on fuel efficiency in a single market, but whether there would be a significantly adverse effect upon fuel efficiency in the air transportation system as a whole. National has presented no basis for a finding that competition would

significantly compromise industrywide efforts at promoting fuel efficiency, and we perceive none.

In any case, we do not agree with National that competition will have a deleterious impact on fuel efficiency, even if we assume for purposes of argument that, as National maintains, the Miami-Los Angeles market should be viewed in isolation and that load factors are an appropriate measure of fuel efficiency therein.[47] Specifically, we have compared National's nonstop Miami-Los Angeles load factors in 1972, the base year established by EPACA for measuring the significance of regulatory actions on fuel conservation and efficiency, to the load factors that the combined operations of Western and National would most likely produce in the subject market in the forecast year. Our computations show that the combined operations of National and Western would result in the average annual load factor for their nonstop services of approximately 51 percent, which is higher than the 43 percent figure experienced by National's nonstop operations in 1972.[48] Consequently, there is no merit

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[47] Nothing in this opinion should be construed as prejudging in any respect any determination that the Board may make in the rulemaking proceeding required by EPACA.

[48] National's nonstop 1972 load factors have been obtained from service-segment data on file with the Board. We have calculated the combined load factors for Western and National in the forecast year by dividing the total number of passengers that the carriers are likely to transport over the segment (356,378) by the number of seats that they are likely to offer (698,517), as reflected in our traffic forecast at fn. 9 *supra*. In addition, we note that Northeast also operated nonstop service in the Miami-Los Angeles market until it terminated operations in July 1972. However, Northeast was able to achieve an average load factor for its nonstop services of only about 32%. Thus, if the combined nonstop operations of both Northeast and National in 1972 are considered, the resulting average load factors would be less than those reflected for National's nonstop service alone.

in National's contention that Western's competition would have a significant adverse impact on efficient utiliaztion of fuel within the meaning of EPACA, even if this factor is measured and considered on National's terms.

In summary, we have concluded that the traveling public should not be deprived of the new and improved air transportation services that we have authorized herein on the basis of fuel conservation and efficiency factors as argued by National. As detailed elsewhere in this opinion, we have found that competition is required by significant air transportation considerations. By contrast, we have also found that competition should not have a significant adverse effect on fuel conservation or efficiency, particularly when these factors are considered, as they must be, on an industry-wide and nationwide basis. On balance, therefore, it is clear that the substantial public interest benefits resulting from our award in this proceeding outweigh by far any likely fuel-related effects.

9. Ultimate Findings and Conclusions

Upon consideration of the foregoing and all the facts of record, the Board finds that the public convenience and necessity require:

1. That Western's certificate for Route 35 be amended to authorize the carrier to operate nonstop service between Miami-Ft. Lauderdale, Fla., and Los Angeles-Ontario, Calif.

We further find:

1. That Western is a citizen of the United States within the meaning of the Act and is fit, willing, and able to properly perform the air transportation authorized to be performed by it and to conform to the provisions of the Federal Aviation Act and the Board's rules, regulations, and requirements thereunder.

2. That for the purposes of determining license fees in accordance with the schedule set forth in Section 389.25 of the Board's regulations, the annual gross transportation revenue increase for the first year of operations resulting from the new certificate authority granted herein is estimated to be in excess of $10 million.

3. That pursuant to sections 401(g) and 408(b) of the Federal Aviation Act the certificate of Delta Air Lines for Route 27 should be amended to remove segment 7 therefrom.

4. That our decision herein does not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

5. That, except to the extent granted herein, all applications, requests, and motions involved herein be denied, and this proceeding terminated.

An appropriate order will be entered.

MINETTI, TIMM and WEST, Members, concurred in the above opinion. ROBSON, Chairman, and O'MELIA, Vice Chairman, concurred in part and filed the attached separate statement.

SEPARATE STATEMENT OF CHAIRMAN ROBSON AND VICE CHAIRMAN O'MELIA

We concur in the Board's determination to select Western as National's principal competitor in the local Miami-Los Angeles market. We agree, specifically, that the choice of a carrier to compete with National is a close one and that, on balance, the selection of Western from among a number of highly qualified candidates is best. We have, like our colleagues, considered the Board 's responsibilities under the National Environmental Policy Act of 1969 and the En-

ergy Policy and Conservation Act of 1975, and we believe that an award to Western its consistent with our responsibilities under those statutes. Nevertheless, we believe that this proceeding presents the Board with a unique opportunity to fashion an award to Pan American that will redound to the advantage of both international travelers and the carrier. Mindful of our statutory duty to promote and develop "an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce . . .", we would exploit this opportunity by also authorizing Pan American to provide nonstop service on a permissive basis for a three-year test period.

Throughout the course of this proceeding, Pan American has argued that if awarded Miami-Los Angeles authority, it would provide a vast array of new and improved international air transportation services. Although we agree with our colleagues that Pan American's contentions are overstated, we believe that there can be little dispute that the Miami-Los Angeles segment would be a significant adjunct to the carrier's international operations, and that Pan American's operations over the route would promote and develop international air transport services to a far greater extent than any other applicant in this case. The facts in this regard are relatively simple. First, Pan American retains an extensive route system both east of Miami and west of Los Angeles, despite the recent attrition in the carrier's international services. Second, the Miami-Los Angeles route integrates well into these operations, permitting the carrier to combine local and international passengers on the same flights over the segment. Third, as a result of these factors, an award to Pan American would allow the carrier to upgrade its service in markets beyond Miami and Los Angeles. Further, it is apparent that Pan American's route structure is such that if authorized to operate in the market, it will be in a position to offer more new international flights and to convenience more international passengers than any other applicant. In this connection, it is significant that no applicant operates as extensively beyond Miami and beyond Los Angeles as Pan American. Indeed, Pan American is the only applicant to propose new international service benefits beyond both terminal points. The import of these factors is graphically illustrated by the Board's finding that despite serious overstatements in Pan American's beyond-segment forecasts, the carrier should still be able to convenience approximately 65,000 beyond segment passengers, most of whom are international passengers. This figure is substantially above the projections of other applicants.[1]

By making it possible for Pan American to upgrade its international services, the Miami-Los Angeles segment should allow the carrier to compete more effectively with foreign air carriers. In this way, the Miami-Los Angeles authority will make a valuable contribution to the carrier's on-going efforts at improving its financial position. Thus, by way of example, Pan American points out that its improved single-carrier service resulting from an award in this case will increase its participation in a number of international markets, including the Los Angeles-Brazil markets.

In short, any award of Miami-Los Angeles authority should improve Pan American's international operations and ability to compete with foreign air carriers, and as a result substantially benefit the carrier,

[1] By comparison, Braniff comes closest to Pan American in its ability to provide international beyond-segment benefits. But Braniff estimates that it will be able to convenience only about 25,000 international passengers if awarded authority in this case.

the overall U.S.-flag effort, and the traveling public. Further, on a relative basis, Pan American's ability to convenience international passengers with new or improved service as a result of an award in this case is far greater that that of any other applicant. While these considerations do not, in our judgment, justify the selection of Pan American as National's principal competitor in preference to Western in view of Western's superior ability to meet the needs of domestic traffic, they do warrant the addition of Pan American as the third carrier in the market.

We appreciate, however, that an award to Pan American on the basis of international considerations should not concomitantly serve to jeopardize the operations of either Western or National. Therefore, in order to insure that Pan American will focus its efforts on improved international air services, on the one hand, and to insure that its operations will not undermine the ability of either Western or National to effectively meet the needs of the Miami-Los Angeles market, on the other hand, we would impose a long-haul restriction on the carrier's authority in the Miami-Los Angeles market, namely that, Pan American flights serving the market must originate and terminate at a point west of Honolulu.

As noted, Pan American has proposed to operate three daily round trips in the primary market. Of these flights, only one is scheduled to originate at a point west of Honolulu. Consequently, assuming that Pan American adheres to this aspect of its service proposal and giving due consideration to the nature of the long-haul restriction that we would impose and the recent diminution of Pan American's beyond segment traffic potential, it is reasonable to conclude that Pan American's initial Miami-Los Angeles operations will be limited to one daily round trip. The evidence

is that Pan American stands a good chance of operating such service on a profitable basis, and, at the very least, should be given an opportunity to demonstrate its traffic generating ability.

Moreover, we do not believe that Pan American's operations will have a substantially adverse impact on National or Western or on other certificated carriers generally. The addition of Pan American will, of course, intrude most on the traffic potential of National and Western. But taking into consideration the overall traffic available in the market, on the one hand, and the limited nature of Pan American's service, on the other, it is our belief that both National and Western should be able to conduct profitable Miami-Los Angeles operations.[2] In like fashion, we do not believe that an award to Pan American would contravene the purposes of the pertinent environmental and energy statutes.

However, we appreciate that there are risks and uncertainties attendant to a decision to certificate Pan American. Thus, it may turn out that Pan American cannot capture enough traffic to operate successfully, given the carrier's continuing and concerted effort at financial rehabilitation and the impact that these efforts have had, and may continue to have, on both its system schedules and overall traffic potential. On the other hand, Pan American's operations may have more of an unsettling effect upon those of Western or Na-

[2] We have considered, in this connection, the majority's implicit recognition that a precise traffic estimate for three-carrier operation in the forecast year is impossible and the express statement that traffic will undoutedly grow to the point where it will in time support five daily round trips. We fully appreciate the immediate uncertainties. However, another Miami-Los Angeles case in the immediate future is highly unlikely and an opportunity, if missed, cannot readily be grasped again. Cf.: The Board's recent unanimous award to Frontier as a third Chicago-Omaha carrier. Order 75-9-19, Sept. 8, 1975, especially pp. 10-12.

tional than we now believe likely, particularly if overall traffic in the market does not reach predicted levels, or if Pan American captures a greater share of the market than forecasted, or both. These potentials are of sufficient moment to warrant a cautious approach with respect to Pan American's route authority. Accordingly, we believe that it is appropriate and necessary to protect the interest of the traveling public and affected parties in the following ways. First, we would limit Pan American's Miami-Los Angeles authority to a period of three years. In this way the Board will be able to determine through actual experience in the marketplace whether the benefits that flow from Pan American's award will, as we believe, offset its potential impact on other carriers. The Board has the capability for monitoring operations in the market and for re-examining the question of Pan American's authority at the end of the three-year period. Second, we would authorize, but not require, Pan American to provide Miami-Los Angeles service and thus avoid impairing that carrier's efforts at financial rehabilitation should the route ultimately prove to be disappointing for that carrier.

In all these circumstances, we have concluded, contrary to the majority that Pan American's service in the Miami-Los Angeles market is required by the public convenience and necessity. This is, we think, an opportunity for responsibly venturing beyond the confines of traditional orthodoxy. It is a case offering an opportunity for the Board to broaden its perspective—addressing both domestic and international considerations in a single proceeding. We regret that the Board has not seized the opportunity.

/s/ JOHN E. ROBSON

/s/ RICHARD J. O'MELIA

Issued pursuant to
Order 76-3-93

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended)

for Route 27

DELTA AIR LINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the coterminal points Miami and Fort Lauderdale, Fla., the intermediate points Tampa, St. Petersburg-Clearwater, and Jacksonville, Fla., Washington, D.C., Baltimore, Md., Philadelphia, Pa., New York, N.Y.-Newark, N.J., and Worcester, Mass., and (a) beyond Worcester, the intermediate point Manchester-Concord, N.H., and Portland, Lewiston-Auburn, Augusta-Waterville, and Bangor, Maine, and the terminal point Presque Isle-Houlton, Maine; and (b) beyond Worcester, the intermediate points Boston, Mass., and Portland, Lewiston-Auburn, Augusta-Waterville, and Bangor, Maine, and the terminal point Presque Isle-Houlton, Maine;
2. Between the coterminal points Miami and Fort Lauderdale, Fla., the intermediate points Tampa, St. Petersburg-Clearwater, and Jacksonville,

Fla., Washington, D.C., Baltimore, Md., Philadelphia, Pa., New York, N.Y.-Newark, N.J., and New Bedford-Fall River, Martha's Vineyard, Nantucket, and Hyannis, Mass., and the terminal point Boston, Mass.;

3. Between the terminal point Boston, Mass., the intermediate points Manchester-Concord, N.H., Lebanon, N.H-White River Junction, Vt., and Montpelier-Barre, Vt., and the intermediate point Burlington, Vt.;

4. Between the terminal point Portland, Maine, the intermediate points Lewiston-Auburn, Maine, and Montpelier-Barre, Vt., and the terminal point Burlington, Vt.;

5. Between the coterminal points Miami and Fort Lauderdale, Fla., the intermediate points Tampa, St. Petersburg-Clearwater, and Jacksonville, Fla., Washington, D.C., Baltimore, Md., Philadelphia, Pa., New York, N.Y.-Newark, N.J., Hartford, Conn., and Springfield, Mass., and (a) beyond Springfield, the intermediate points Keene, N.H., Lebanon, N.H.-White River Junction, Vt., Montpelier-Barre, Vt., and the terminal point Burlington, Vt., and (b) beyond Springfield, the terminal point Boston, Mass.;

6. Between the terminal point Presque Isle, Maine, the intermediate points Bangor and Portland, Maine, Manchester-Concord, N.H., Lebanon, N.H.-White River Junction, Vt., Burlington, Vt., Cleveland, Ohio, and Detroit, Mich., and the terminal point Chicago, Ill.

The service herein authorized is subject to the following terms, condition, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary

suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate, and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points prior to the effective date of this certificate. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein, other than a point required to be served through a single airport, through any airport convenient thereto, and render scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby.

(3) The holder shall serve at least two intermediate points south of Burlington, Vt., on each flight operated by the holder between New York, N.Y.-Newark, N.J., on the one hand, and Burlington or Montreal, Canada, on the other hand.

(4) The holder shall serve Hartford, Conn., and Springfield, Mass., only on flights originating or terminating at Keene, N.H., or a point north thereof, or originating or terminating at Philadelphia, Pa., or a point south thereof.

(5) The holder's authority to serve Augusta-Waterville and Lewiston-Auburn, Maine, Hyannis, Martha's Vineyard, Nantucket, and New Bedford-Fall River, Mass., Keene, N.H., Lebanon, N.H.-White River Junction, Vt., and Montpelier-Barre,

Vt. is suspended for the period during which Air New England serves such points or until further Board order.

(6) The holder shall not engage in air transportation with respect to persons and property between Fort Lauderdale and Miami, Fla.

(7) Augusta-Waterville and Presque Isle-Houlton, Maine, and Manchester-Concord, N.H., shall each be served through a single airport.

(8) All flights serving Cleveland, Ohio, or points west of Cleveland shall serve at least one of the following points: Presque Isle, Bangor, and Portland, Maine, Manchester-Concord, N.H., Lebanon, N.H.-White River Junction, Vt., or Burlington, Vt.

(9) No single-plane service shall be operated between Boston, Mass., or Hartford, Conn.-Springfield, Mass., on the one hand, and Cleveland, Ohio, or points west of Cleveland, on the other hand.

(10) Flights operating nonstop between Boston, Mass, on the one hand, and Hartford, Conn., or Springfield, Mass., on the other hand, shall originate or terminate at a point south of Washington, D.C.

The exercise of the privileges granted by this certificate shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate shall be effective on June 13, 1976: *Provided, however*, That prior to the date on which this certificate would otherwise become effective, the Board either on its own initiative or upon the timely filing of a petition or petitions seeking reconsideration of the Board's order of March 15, 1976 (Order 76-3-93), insofar as said order authorizes the issuance of this

certificate, may by order or orders extend such effective date from time to time.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this certificate to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 15th day of March, 1976.

PHYLLIS T. KAYLOR
Acting Secretary

(SEAL)

APPENDIX

DOCKET 24694

THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION REFERRED TO HEREIN IS NOT ATTACHED TO THIS COPY BECAUSE OF THE WIDE CIRCULATION GIVEN AT THE TIME OF ITS RELEASE.* THE INITIAL DECISION IS ATTACHED TO THE ORIGINAL OF THE BOARD'S OPINION AND TO THE OFFICIAL COPIES IN THE BOARD'S FILES AND MAY BE EXAMINED THERE. IT WILL ALSO BE PRINTED AS PART OF THE OFFICIAL "CIVIL AERONAUTICS BOARD REPORTS."

* Served: June 13, 1973

Order 76-3-93

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 15th day of March, 1976

MIAMI-LOS ANGELES COMPETITIVE NONSTOP CASE — Docket 24694

ORDER

A full public hearing having been held in the above-described proceeding, and the Board having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof,

IT IS ORDERED THAT:

1. Amended certificates of public convenience and necessity in the forms attached hereto be issued to Western Air Lines, Inc., for Route 35, and to Delta Air Lines, Inc., for Route 27;

2. Said certificates shall be signed on behalf of the Board by its Secretary, shall have affixed thereto the seal of the Board, and, subject to the extension of their effective dates in accordance with the provisions of said certificates, shall be effective 90 days after the date of service of this order, *Provided, however,* That the effective date of Western's certificate shall be automatically postponed until further Board order if the appropriate license fee is not paid pursuant to section 389.21(b) of the Board's Organization Regulations; and

3. Except to the extent granted herein, all applications, requests, and motions involved herein be and they hereby are denied and this proceeding be and it hereby is terminated.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Acting Secretary

(SEAL)

Issued pursuant to
Order 76-3-93

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended)

for Route 35

WESTERN AIR LINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail, as follows:

1. Between the terminal point Minneapolis-St. Paul, Minn., the intermediate points Sioux Falls, Pierre, and Rapid City, S. Dak., and (a) beyond Rapid City, the intermediate point Cheyenne, Wyo., and the terminal point Denver, Colo., and (b) beyond Rapid City, and terminal point Sheridan, Wyo., and (c) beyond Rapid City, the intermediate point Casper, Wyo., and the terminal point Salt Lake City, Utah;
2. Between the terminal point Denver, Colo., the intermediate points Salt Lake City, Utah, and Reno, Nev., and the coterminal points San Francisco-San Jose and Oakland, Calif.;
3. Between the terminal point Minneapolis-St. Paul, Minn., the intermediate points Denver, Colo., and Phoenix, Ariz., and the terminal point San Diego, Calif.;

4. Between the terminal point Phoenix, Ariz., and the terminal point Los Angeles, Calif.;
5. Between the coterminal points Minneapolis-St. Paul, Minn., Denver, Colo., Phoenix, Ariz., and San Francisco-Oakland-San Jose, Los Angeles-Ontario-Long Beach, and San Diego, Calif., the intermediate point Hilo, Hawaii, and the terminal point Honolulu, Hawaii;
6. Between the terminal point Miami-Ft. Lauderdale, Fla., and the terminal point Los Angeles-Ontario, Calif.

The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate; and may continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points prior to the effective date of this certificate. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and render scheduled nonstop service between any two points

not consecutively named herein between which service is authorized hereby.

(3) The holder shall render service to Sioux Falls, S. Dak., only on flights originating or terminating at Rapid City, S. Dak., or a point west thereof, or at Denver, Colo.

(4) The holder shall not operate through-plane service between Reno, Nev., on the one hand, and points (other than Denver, Colo.) north or east of Salt Lake City, Utah, on its Routes 19, 28, or 35, on the other hand.

(5) The holder shall not serve Los Angeles or San Diego, Calif., Las Vegas, Nev., or any point north or east of Denver on flights which serve both Salt Lake City, Utah, and Denver, Colo.

(6) The holder shall provide nonstop service, between Phoenix, Ariz., on the one hand, and Los Angeles, Calif., on the other hand, only on flights originating or terminating at Portland, Oreg., Seattle, Wash., or Hilo or Honolulu, Hawaii.

(7) On flights serving Los Angeles, Calif., on the one hand, and Phoenix, Ariz., on the other hand, on segment 4, the holder shall not schedule single-plane service to Denver, Colo.

(8) The holder shall not schedule single-plane service through the San Jose airport between San Francisco-San Jose, Calif., and Reno, Nev.

(9) Flights on segment 5 serving Los Angeles-Ontario-Long Beach, Calif., shall also serve a point east of California.

(10) The authority granted in segment 5 is limited to the carriage of persons, property, and mail having a point of origin, destination, stopover, or transit in the State of Hawaii. Pursuant to such authority, the holder may grant stopover privileges at any coterminal on the United States mainland named in said segment to passengers moving to or from a point in the State of Hawaii.

(11) On flights serving both Honolulu and Hilo, Hawaii, the holder shall not deplane at one of said points persons, property, or mail enplaned at the other.

(12) The holder's authority to serve Hilo, Hawaii, shall be contingent upon its filing and keeping on file with the Board tariffs providing for common fares for persons and their accompanied baggage to and from all points in the State of Hawaii receiving service from a certificated air carrier, for all classes of service which the holder offers, and further providing for stopovers without charge or at nominal charge at the points of entry into and departure from the State of Hawaii and at intermediate points between such points of entry and departure and the ultimate point of origin or destination in the State of Hawaii, subject to such terms, conditions, and limitations as may be agreed upon by and between the holder and the certificated air carriers serving points in the State of Hawaii other than Honolulu and Hilo and are approved by the Board: *Provided, however*, that in the event of a disagreement between the holder and such carriers as to the terms, conditions, and limitations applicable to such common fares (including the divisions thereof), this condition shall be deemed to be satisfied if the holder offers to enter into an agreement concerning such common fares which the Board determines to be reasonable.

The exercise of the privileges granted by this certificate shall be subject to such other reasonable terms, conditions, and limitations required by the public in-

terest as may from time to time be prescribed by the Board.

This certificate shall be effective on June 13, 1976: *Provided, however,* That prior to the date on which this certificate would otherwise become effective the Board, either on its own initiative or upon the timely filing of a petition or petitions seeking reconsideration of the Board's order of March 15, 1976 (Order 76-3-93), insofar as such order authorizes the issuance of this certificate, may by order or orders extend such effective date from time to time: *Provided, further,* That the effective date of said certificate shall be automatically postponed until further Board order if the appropriate license fee is not paid pursuant to section 389.21(b) of the Regulations.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this certificate to be executed by the Secretary of the Board, and the seal of the Board, to be affixed hereto, on the 15th day of March, 1976.

PHYLLIS T. KAYLOR
Acting Secretary

(SEAL)

APPENDIX C

Order 76-6-120

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 16th day of June, 1976

MIAMI-LOS ANGELES COMPETITIVE NONSTOP CASE — Docket 24694

ORDER ON RECONSIDERATION AND DENYING STAY

By Order 76-3-93, March 15, 1976, the Board awarded Western Air Lines nonstop competitive authority in the Miami-Los Angeles market. In so doing, the Board affirmed the decision of the administrative law judge that the market needs, and can support, service in competition with National Airlines, the incumbent. The Board nonetheless reversed the judge's selection of Pan American as the competitive carrier.

As the Board stated in its opinion, the choice of carrier to compete with National was quite close. The unanimous selection of Western in lieu of Pan American and various other applicants was based in large measure on the Board's judgment that the selection of Western was likely to result in superior benefits for the traveling and shipping public. In particular, the Board's opinion noted that two-thirds of the Miami-Los Angeles traffic originates at Los Angeles or other west coast cities and that Western's pre-eminent position at Los Angeles and its route structure beyond Los Angeles would permit it to offer the best local market and beyond-segment service immediately and in the years to come. In reaching this decision, the Board denied the application of Delta Air Lines and modified the carrier's certificate so as to formally remove from that

certificate the Miami-Los Angeles segment which had been included in a suspended form pending the outcome of this proceeding. The Chairman and Vice Chairman dissenting in part, would have authorized Pan American to operate as a third carrier in the market essentially as a means of conveniencing international travelers and bolstering the carrier's on-going efforts at improving its financial position.

Various petitions for reconsideration of the Board's decision, along with requests to reopen the record and remand the case for further hearings, further requests for an administrative stay of the decision pending judicial review, and answers have been filed. We have carefully considered all matters presented and have decided to deny all requests for reconsideration, remand, or stay. Our decision shall go into effect on July 4, 1976.

I. Petitions of National and Pan American For Stay Pendente Lite

We have decided to deny the requests for stay filed by National and Pan American. The Board has in numerous prior cases emphasized that the appropriateness of a stay rests upon the particular circumstances of each individual case. "Not unlike the courts in similar situations, the Board must assess [the movants'] probability of success on the merits in the judicial proceeding; balance any irreparable injury to [the movants], should the stay be denied, against injury to . . . other parties . . . should the stay be granted; and most importantly, ascertain and effectuate the public interest."[1] Our careful consideration of these factors leads

[1] *Alaska Service Investigation*, Order 72-1-94 at 11 (January 26, 1972). Also see, *New England Service Investigation*, Order 74-12-81 at 2 (December 20, 1974); Application of Pan American and TWA for Approval of Agreement, Order 75-2-108 at 2 (February 27, 1975); and the *Air Carrier Reorganization Investigation*, Order 76-1-121 (January 30, 1976).

us to conclude that the motions of National and Pan American for a stay pending judicial review should be denied. Although the legal validity of our action ultimately rests with the courts, for the reasons given in our original opinion and herein, we believe that our action is statutorily sound and otherwise in accord with law, and no argument of either movant causes us to doubt that conclusion or affords any ground for granting the motions. Therefore, the primary questions raised by the motions for a stay pertain to the interrelated factors of injury to the parties, and the effect of a stay upon the public interest. We turn to a discussion of these questions.

A. Private Interests

National argues that it will be harmed by "the serious amount of diversion" resulting from Western's competition. It is not clear, however, whether National is claiming irreparable injury. Even if it is, we reject National's contention. First, revenue diversion, even in substantial amounts, has been consistently rejected by both the Board and the courts as constituting irreparable harm, and we believe these precedents, without more, compel a similar result in the circumstances presented. Second, as we have already determined, National has overstated the diversionary impact of a competitive award in this case. Third, and in any case, there has been no showing, or even an allegation, that either National's overall financial health or its ability to meet its public service obligations will be significantly affected by the termination of its long-standing market monopoly.

Next, National argues that unless a stay is granted, a later decision by the court in National's favor on the merits would be insufficient to protect National's financial stake because the Board would probably reach the

same result on remand that it has reached in the challenged decision. National claims that this would constitute a violation of its due process rights. To support this speculation, National makes the contention that in past route cases in which a stay has been denied and the challenged decision has been subsequently found legally deficient, the Board has customarily reached the same decision on remand.

National's allegations that it will suffer irreparable injury through denial of due process is without merit. It is of course by no means certain that there will be a remand, and, indeed, as we have shown herein, we believe that National is not likely to prevail on the merits. However, even if the Court ultimately accepts National's contentions on the merits, it would not mean that National is entitled to maintain its market monopoly. It would mean at most that the case would have to go back to the Board for further consideration in light of such legal deficiencies as the Court might find. In such event, National would be entitled to no more than conscientious reconsideration of the case by the Board, and the possibility that the Board would again reject National's position involves no invasion of any right of National's, let alone irreparable injury to it. In this connection, and as National should be aware, the Board gives no credit in remanded route proceedings for operations conducted pursuant to an award found by the court to have been tainted with legal error. See, *e.g.*, *Southern Airways Route Realignment Investigation*, Order 71-1-38 and *Southern Tier Competitive Nonstop Investigation*, (Houston-Miami Phase), Order 71-3-34. Indeed, National has not brought to our attention any precedent which supports its speculations. On the contrary, it refers to cases which demonstrate the fairness of the Board's procedures. For example, although the Board initially

awarded TWA single-plane Miami-Los Angeles authority in the *St. Louis-Southeast Service Case* (27 CAB 342), the Board terminated that authority in the remanded proceeding in order to avoid prejudicing the rights of other parties. See Order E-15599, served July 29, 1960. Similarly, although the Board's decisions in the *Southern Transcontinental Service Case* and *Southern Tier Case* were remanded by the courts on carrier selection issues, and not for reconsideration by the Board of its need for service findings, the Board nevertheless reexamined the need for competitive service in the remanded proceedings. See, *Southern Tier Competitive Nonstop Investigation*, Orders 69-7-135 and 73-2-89. In short, it is clear that to the extent (if any) that statistics show that the Board "usually" reaches the same result on remand, this consideration affords no basis for concluding that the Board has not in the past conscientiously carried out its responsibilities in accordance with the terms of a remand, or that it would not do so in the event of a remand in this case.

National indicates that few, if any, of its employees will lose their jobs as a result of a competitive award in this proceeding. However, it maintains that Western's competition will harm National by decreasing employee productivity, and that this consideration constitutes grounds for a stay. We disagree. In the first place, National's contentions assume that its operations will remain static and that its employees cannot be efficiently employed servicing other flights. However, this argument overlooks the recent trend toward improved traffic growth and the fact that National itself is a candidate for expanded route authority in a number of contemporaneous Board proceedings. In any case, National has not, significantly, attempted to quantify the harm that will be occasioned by the loss of employee productivity or, for that matter, argue that

such harm will be irreparable. And for good reason. It is highly unlikely that the addition of two daily competitive nonstop round trips in the Miami-Los Angeles market will have significantly adverse impact either on the overall productivity of National's employees, or on the overall efficiency of the carrier's operations.[2]

Finally, we cannot leave unmentioned the fact that National has, for seven years, been the beneficiary of a de facto monopoly in circumstances in which the Board has found competitive service to be required by the public convenience and necessity. The Board first made a competitive award in this market in 1969 in a decision which was not challenged in court by National. The carrier selected—Northeast—was never a satisfactory competitor, and all competition was ended in 1972 following the Delta-Northeast merger. This factor cannot be ignored in assessing the private interests involved.

For its part, Pan American does not claim that it will suffer serious diversion if Western is selected to compete with National. Nor can it, since Pan American provides no service in the Miami-Los Angeles market. Rather, Pan American, like National, argues that the Board should stay its award *pendente lite* in order to avoid prejudicing Pan American's ability to obtain a

[2] National also argues that the Board should stay its decision herein in light of Delta's contemporaneous petition for judicial review. National states that if the Board does not stay its award to Western, and if Delta is successful in its judicial review proceedings, there will be three unrestricted carriers in the market notwithstanding the Board's finding that the market can sustain only two competiting carriers. National's contentions border on the frivolous. As reflected in our opinion, there is no need for granting the applications of both Delta and Western and, as National should be aware, both the Board and the courts have ample authority to insure an orderly transition of carriers in the event that Delta succeeds in its appeal and is ultimately selected for the route.

fair hearing in a remanded proceeding. In Pan American's view, Western's initial services and expenditures would "inevitably influence any Board decision on remand." Pan American's contentions must be rejected for reasons advanced in response to similar arguments made by National, particularly since we have shown that it is the Board's practice to accord all parties a fair hearing in a remanded proceeding, and to accord no decisional weight to interim operations or expenditures by a carrier operating a route during judicial review and remanded proceedings. In these circumstances, Pan American has failed to demonstrate that it would experience any injury if its request for stay is denied, let alone irreparable injury.

As noted, the determination of whether a stay should be issued involves a balancing of the equities of the private parties. In this connection, Western stands ready, willing and able to perform its newly authorized service. It maintains, and the Board agrees, that it will experience substantial net operating profits in the forecast year. In our judgment, the rights of Western and its interests are just as worthy of consideration and protection as National's and Pan American's. Indeed, Western can no more recoup its losses in the event a stay is granted than can National if a stay is denied. In such circumstances, Western should be entitled to the benefit of the Board's presumptively correct order during the review proceedings. Further, in balancing the equities of National and Western, it is significant, as discussed, that National has long received unanticipated benefits resulting from the lack of effective competition in the Miami-Los Angeles market.

In all these circumstances, we find that the balance of private interests militates strongly in favor of denying the stay requests.

B. Public Interest

Having determined that the movants are not likely to succeed on the merits of their positions, and that the balance of private interests weighs convincingly in favor of denying the stay requests, we now consider the most important factor—the impact of a stay of our competitive route award on the public interest.

As reflected in our earlier opinion and herein, both the Board and its administrative law judges have, since 1969, repeatedly stressed the need for, and the benefits that would result from, competition in the Miami-Los Angeles market. Western was selected because it would offer more significant public benefits than any other carrier. To repeat, its proposed primary market services are comparable or superior to the likely initial operations of the other applicants. Further, from the outset Western will bring improved single-plane service to at least 7,000 passengers in the Miami-Seattle market, and new single-carrier service to at least 37,000 passengers in seven other beyond markets. A stay would, of course, deprive the traveling public of the benefits of competition, generally, and Western's services, in particular.

We believe that in the circumstances presented, the loss of these benefits alone requires the denial of the stay requests. The fact that the public has long been denied the benefits of effective competition found to be required by the public convenience and necessity weighs heavily on the public interest scale. As the Board has often observed, it is the public interest which must be the prime consideration in shaping its actions in response to petitions for stay. And as the courts have stated:

> "In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily become crucial. The interests of private litigants must give way to the realization of public purposes." [3]

In sum, we find that in considering the movants probability of success on the merits of their positions, in balancing the potential injury to Western as compared to National and Pan American, and in ascertaining where the public interest lies, the facts and circumstances of this case clearly compel our denial of the petitions for stay pending judicial review.

II. Requests for Further Evidentiary Proceedings

National and Pan American request that the Board reopen the record for further evidentiary proceedings on the issue of the need for competition in the Miami-Los Angeles market, and carrier selection, respectively. National claims that such action is required because the Board has violated the standards of administrative decisionmaking required by law by basing its decision on a factually stale record, relying on questionable extra-record forecasts and assumptions, and neglecting critical intervening events since the case was tried. National avers that it will demonstrate in a reopened proceeding that the Miami-Los Angeles market cannot support competition; that the Board has failed to show any deficiencies in National's service that would be remedied by competition; and that the Board erred (1) in concluding that the benefits of competition outweigh the diversionary impact on National; (2) in declining to apply the 55% established in the DPFI as a benchmark for evaluating historic and future traffic/capacity relations; and (3) in not reopening the record for the preparation of an "energy impact statement" as previously requested by National. Pan American con-

[3] *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

tends, *inter alia*, that the Board's selection of Western was based upon an unfair comparison of the applicants in that the Board arbitrarily selected facts and assumptions favoring Western while ignoring evidence in the record and changed circumstances which militate against Western's selection.

The Board has considered each of the arguments advanced by National and Pan American and has concluded that it would be inconsistent with the public interest to grant the relief they have requested. In reaching this conclusion we note that the Supreme Court has held that requests for a rehearing or a reopening of a record before an administrative agency are matters within the discretion of the agency, rather than matters of right. See, for example, *United States v. I.C.C.*, 396 U.S. 491 (1970), and *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503 (1944). Pursuant to the foregoing, the Board has stated:

> "Our general policy with respect to motions to reopen the record for receipt of data on the most recent operating experience has consistently reflected the requirement of the public interest that the record in major route cases be brought to a close as expeditiously as possible, consistent with the requirements of a full hearing, so that final decision may be rendered promptly. . . . Only in cases where the situation under consideration has changed radically would such [a reopening of the record] be justified. . . ." [4]

Application of these precedents to the circumstances of this proceeding leads us to conclude that it would be

[4] *Great Lakes-Southeast Service Case*, 27 C.A.B. 829, 852 (1958), aff'd, *Eastern Air Lines, Inc. et al. v. CAB*, 271 F.2d 752 (D.C. Cir. 1958). See, also, *St. Louis-Southeast Service Case*, 27 C.A.B. 342 (1958); and *Chicago-Milwaukee-Twin Cities Case*, 29 C.A.B. 901 (1959).

inconsistent with the public interest to reopen the record for further evidentiary proceedings as requested herein. To begin with, we believe that both National and Pan American have applied for substantial and fundamental relitigation under circumstances that would ordinarily compel rejection of their requests. Notwithstanding the fact that the Board and its administrative law judges have repeatedly found that this, the largest monopoly market in the country, needs and can support competition, National desires yet another opportunity to demonstrate the contrary. Similarly, Pan American wants another bite at the apple after the Board has found material deficiencies in its primary market service proposal and has otherwise rejected its theory of the case. A reopening of the record in these circumstances would in our judgment invite interminable delays in, and materially compromise the finality of, the Board's processes. This consideration takes on special significance in the circumstances of this proceeding, given the fact that although the Board first authorized competition in 1969, none has been effectively provided. There can be little question that further protracted litigation would seriously inconvenience and burden the traveling public and other interested parties. Morever, as we shall now demonstrate, neither National nor Pan American has directed our attention to any matters which they might seek to elicit on remand which persuades us that further proceedings would bring about a different result or is otherwise necessary or desirable.

A. National

We are not persuaded by National's argument that the Board violated the carrier's due process rights by updating the forecasts of record allegedly "without a hearing." First, in analyzing and weighing economic evidence in formal proceedings, the Board's role has

never been restricted to the exercise of a veto power over the exhibits and arguments of the parties. On the contrary, the Board has not been content to merely adopt or reject the various evidentiary submissions; instead, in virtually every significant route case the Board has routinely adjusted the parties' forecasting methodologies and assumptions as necessary. If a new hearing were required after every forecasting adjustment found necessary by the Board, the administrative process would be severely crippled.

Furthermore, the principal case relied upon by National to support its due process challenge, *Delta Air Lines v. CAB*, 442 F.2d 730 (D.C. Cir., 1970), is clearly inapposite to the present facts. In that case, the Court determined that the Board had failed to accord due process to Delta, one of a number of applicants for new routes, by (1) advancing the forecast year for a competing applicant, Southern, without doing the same for Delta, and by (2) increasing Southern's projected revenues by 15 percent to reflect new on-line connecting traffic in the face of the carrier's own claim of only a 1.5 percent figure. In other words, far from announcing a general hearing requirement each time the Board updates or otherwise adjusts a traffic or financial forecast, the Court found a further hearing necessary only in a specific factual context, marked by unequal treatment of applicants and by the use of forecasting assumptions so different from those in the record as to constitute a wholly new and untested projection.

By contrast, the Board's traffic and diversion estimates in the instant case are based solely on official noticeable data, on estimates documented in the record, and on traffic growth and stimulation projections which are well within the range of estimates employed by the parties. Similarly, the Board did not ignore cost considerations or assume FY 1977 cost levels similar

to CY 1974 forecasts, as National suggests. Rather, the Board based its traffic estimates upon exhibits of record and other officially noticeable data, found that National and Western would operate at predicted load factors in the first year of operations, and concluded that these load factors were demonstrative of profitable operations. Significantly, the Board's use of load factors as a yardstick for measuring the economic viability of competitive operations is precisely the methodology championed by National in its attempt to demonstrate to the Board that the Miami-Los Angeles market must remain within its exclusive preserve. Thus, while National may not approve of the Board's ultimate finding relating to the ability of the subject market to support competition, such finding is nevertheless fully appropriate, in accord with a methodology approved by National, and, as discussed below, legally adequate. That finding hardly constitutes a sufficient basis for remanding the proceeding on the grounds that National has been deprived of its right to a full and fair hearing on the issue in question.

We continue to believe that our finding that the Miami-Los Angeles market is large and strong enough to support competition is reasonable and supported by substantial evidence of record. National, however, lays siege to the finding on a number of fronts. It argues that the Board's traffic forecast overstates the size of the market by employing a 20% stimulation factor (National would use 15%), assuming that 90% of Miami-Los Angeles travelers would use nonstop flights (National argues for 81%), and by not eliminating from its forecast of inter-line connecting passengers those passengers that were accounted for separately in the Board's beyond-segment projections. In addition, National argues that the Board has also overstated Western's beyond-segment potential.

In our judgment, National's attacks on the Board's stimulation, nonstop and beyond-segment passenger estimates are without merit.[5] On the other hand, while we agree that our forecast inadvertently includes duplicated traffic, we cannot find that this consideration undermines our basic determination that the Miami-Los Angeles market can support competition. Indeed, we continue to believe that the market is capable of generating 320,000 or more O&D and interline connecting passengers, notwithstanding the inclusion of duplicated traffic. More specifically, in assessing the reasonableness of our earlier projections, it is important to measure the overstatement resulting from duplication—which amounts to less than 6% of the base year local O&D and interline connecting passengers—against our earlier determination that certain pertinent facts and circumstances made it likely that the Board's conservative forecast did not give full effect to the actual traffic generating potential of the market. See Order 76-3-93, at pp. 6-9. Thus, for example, National does not challenge our determination that the Board's entire forecast is predicated on base year (CY 1974) traffic which had been depressed by the combined effects of National's substandard service, no service during National's 3½ month strike period, and the nation's general economic malaise. Indeed, this point is illustrated by the Board's O&D traffic surveys which show that traffic in the first half of 1975 was about 27% greater than in the first half of 1974. Similarly, it is likely that the 20% stimulation factor found reasonable by the administrative law judge, and later accepted by the Board, does not give ample effect to the substantial interruptions in National's service in 1974 and 1975.

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[5] See our discussion of Western's beyond segment potential, *infra*.

Nevertheless, we have given further consideration to the question of duplication in our forecast. Proceeding under the assumption that the forecast should be adjusted solely to eliminate duplicated passengers (an assumption which, it must be emphasized, we do not endorse), we find that removal of duplicated passengers would reduce the competing carriers' load factors by about two percentage points each—or to about 44.5% for National and 53% for Western in the forecast year.[6] In short, it is apparent that the Miami-Los Angeles market will generate more than 300,000 local O&D and interline connecting passengers in the forecast year, even if duplicated passengers are removed from the Board's estimates, and no corresponding adjustments are made thereto to account for likely forecast understatements; that in the forecast year National and Western will operate wide-bodied equipment over a 2,300 mile stage length at load factors in the 44.5-47% and 51-53% range, respectively, depending upon the weight to be accorded to National's argument relating to duplicated passengers, and that, in the long term, these load factors will increase as the market enjoys predicted growth.

Consequently, the question presented is whether the Board can reasonably find that a market with these characteristics can support competition. The Board answered this question affirmatively in its earlier opinion. On reconsideration National argues that the cost data relied upon by the Board is hopelessly stale; that costs are now, in fact, far higher than reflected in the

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[6] We note, in passing, that we earlier concluded that National was likely to carry a greater share of the nonstop traffic, at least initially, in view of its incumbency and the greater capacity that it proposes. Order 76-3-93, p. 8. Such a divergence from the 50-50 traffic split assumed in our forecast would, of course, improve National's profit potential without seriously compromising Western's profit potential.

record, and that in these circumstances "the Board has no valid basis for reaching a conclusion" that the Miami-Los Angeles market can support competition. National thereafter attempts to show by reference to extra-record date that neither National nor Western can operate profitably at load factors which National predicts will be 45% for Western and between 38-39.5% for National. In our judgment, National's contentions do not undermine our ultimate findings that the market can support competition, or otherwise warrant subjecting the traveling public to further inconvenience by retrying the need for competitive service in the Miami-Los Angeles market for yet a third time.

To begin with, it is important to note that National concedes that the existing evidence of record supports the finding that the market can support competition at the load factors predicted by the Board. Given this concession, the repeated findings of the Board and its administrative law judges on the market's ability to support competition, the extraordinary delay experienced in providing the traveling public with needed competitive service in the market, and the fact that there is no domestic market of comparable size and stage length which does not now have competition, it is clearly incumbent upon National to make a compelling case for its contention that substantial inadequacies in the existing record warrant a further perpetuation of its market monopoly. National has failed to make such a showing. Although the carrier disputes the Board's traffic forecasts, it acknowledges that its own computations show that Western will experience an operating profit of about $\$3/4$ million in the forecast year at an average load factor of 45%. As discussed, we believe that Western's load factors will be above 49%. Further, although National disputes the adequacy of the record it does not directly take exception

to the Board's finding that it can operate profitably at 47% load factors, or argue, after raising the issue, that it could not operate profitably at 44.5% load factors. Indeed, although National relies upon extra record data and assumption in presenting its case for further evidentiary hearings, it has not provided the Board with the one piece of data exclusively within its control and most pertinent to its case, namely, its current break-even load factor for its Miami-Los Angeles nonstop operations. Rather, National's approach to the question of costs is to rely upon evidence presented in another case (*i.e.*, Western's cost estimates in the *Honolulu-Vancouver Route Proceeding*, Docket 27143), in an attempt to show that Western will not be able to operate profitably at load factors in the 44-47% range, and then generally assert "the rough cost analysis made above for Western's operations will apply equally to National's. . . ." However, National's presentation is materially deficient on its face in at least two critical respects. First, it assumes, without any explanation or evidentiary support, that Western's cost experience in the Honolulu-Vancouver market will be comparable to Western's experience in the Miami-Los Angeles market. However, there may well be little correlation, especially since, for example, operating costs may be higher for the overwater Honolulu-Vancouver operation. Second, and equally significant, National assumes, again without any explanation or evidentiary support, that National's cost experience will be the same as Western's. This assumption is inconsistent with our own experience; to cite a single, yet important, example, National's own Form 41 reports on file with the Board demonstrate that its direct operating costs for its DC-10 operations are substantially less than Western's.

Next we consider National's attacks on the Board's findings relating to service deficiencies in the Miami-

Los Angeles market. Significantly, National does not dispute the Board's determination that there are basic deficiencies in National's monopoly service as such, but, rather, argues that the Board has failed to show that any deficiencies in National's service would be remedied by competition. It then goes on to assert that "given the potential for uneconomic and destructive competition at stake here, the Board must make a compelling demonstration" for competition in the market. National claims that no such showing has been made since Western's services would be largely duplicative of National's existing services, and Western is not needed to promote the market. The short answer to National's overall position is that the Miami-Los Angeles market is extremely large and can support competition. In these circumstances, the existence of service deficiencies, or, for that matter, the ability of Western, or any other carrier, to cure existing service deficiencies, is not the *sina qua non* for making a competitive route award. Furthermore, we disagree with National's contentions that Western's competition will have no prophylactic effects, or as National opines, "would amount to nothing." Western's competition should immediately and positively convenience the traveling public by, *inter alia*, offering new and different schedules and by providing an effective counterweight to National's existing incentive to compromise the needs of Miami-Los Angeles travelers by focusing its attention on its southern tier competitive markets. Moreover, even if this were not the case, it is beyond cavil that in the long run competition in the Miami-Los Angeles market will provide far greater assurance that the service deficiencies we have found will be remedied, and the benefits of air transportation maximized, than would otherwise be the case if the traveling public was forced to continue to rely on the beneficence of National's monopoly operation.

National also questions the Board's diversion estimates, arguing that the Board has understated the amount of diversion and the impact that such diversion will have on National. Specifically, in its petition for consideration, National contends that the Board should have applied only "one-year growth offset," and if so applied, the diversion from Western's competition would be about $10 million, rather than the $6.5 million predicted by the Board. In National's view a remand is required because the "Board has absolutely no idea just how damaging a dollar drain of $10-12 million would be for National at this time given the changed circumstances over the past several years. . . ." However, in its petition for stay National, somewhat paradoxically, attempts to quantify the "damage," based upon the Board's estimate of $6.5 million in diversion will result in a "net diversion of $4.9 million . . . ," and that this figure "represents 20 percent of National's operating income for FY 1975—a year in which National's fuel costs were about the lowest in the industry. . . ."

We are not persuaded by National's objections to our ultimate findings on the issue of diversion. To begin with, the Board thoroughly considered the competitive impact of its award in this case and concluded that, on balance, the need for competition substantially outweighs the diversionary effects of Western's competition. In reaching this conclusion the Board detailed factors establishing that competition would not significantly impair National's long-standing financial health or its ability to meet its public service obligations, either in the Miami-Los Angeles or other markets, which is the test historically applied by the Board. See *Additional Service to San Antonio and Austin Investigation*, Order 69-9-105, September 17, 1969, pp. 2-3. Significantly, National does not deny its own record of

financial success or dispute the Board's finding that competition would not jeopardize its operations. In these circumstances, National's allegations that Western's competition would divert more revenues and would cut more deeply into its profit margins that the Board had earlier predicted, even if accepted at face value, do not provide a sufficient basis for depriving the traveling public of the long overdue benefits of competitive service in the circumstances of this case.

However, we believe that National's attack on the Board's diversion estimate is without merit, and, concomitantly, that National has seriously overstated the impact of competition in its efforts to preserve its monopoly. Both the administrative law judge and the Board in this proceeding have already thoroughly considered, and rejected, National's contention that "one-year growth offset" should be used to measure diversion in this case. As noted in our earlier opinion, growth offset is a method for evaluating the diversionary impact of a competitive award on an incumbent carrier —one element of the public convenience and necessity which the Board weighs in determining whether the new service in question should be authorized. In employing growth offset, the Board has uniformly balanced revenue losses through diversion against revenue gains experienced by the incumbent between the base and the forecast years. Judge Dapper found that the Board's traditional methodology should be used in the circumstances of this proceeding, and dismissed National's alternate methodologies on the grounds that they unduly inflated the diversionary impact of a competitive award on that carrier. The Board's reasons for agreeing with the administrative law judge are discussed at pages 10-11 of our original opinion. Suffice to note here that the approach followed by both Judge Dapper and the Board in situations—like the present

—where there is an affirmative need for competition has been judicially approved, and we see no reason to depart from it in this case.[7] On the contrary, adoption of National's "one-year growth offset" would have the practical effect of materially discounting the benefits of competitive service and ignoring the fortuitous profits that National has enjoyed as a result of the absence of effective competition in the Miami-Los Angeles market.

In addition, there is nothing in the record, or otherwise presented by National, to support its assertion that diversion of $6.5 million in revenues in the Miami-Los Angeles market will *ipso facto* reduce its system-wide profits by $4.9 million. Nevertheless, assuming this to be the case, it does not follow that such reduction will represent as much as 20 percent of the carrier's overall profits in the forecast year as alleged. In relying upon its FY 1975 net operating income of about $24 million, National fails to point out that it had no operations for about 30% of FY 1975. Clearly, therefore, National's FY 1975 experience does not provide a reasonable measure of the carrier's profit potential in the forecast year, especially since National recorded profits of about $43 and $60 million in FY 1973 and 1974—the last two fiscal years in which National provided uninterrupted service.

Finally, National argues that further evidentiary proceedings are necessary to consider what it describes as "new air transportation factors arising since the close of the record . . . ," notably inflationary trends, which National believes will have "an obvious [adverse] impact on traffic growth . . ." and the recent

[7] See, *e.g.*, *Frontier Airlines v. C.A.B.*, 439 F.2d 634 (D.C. Cir. 1971). As the court noted therein, there is "no visible crippling vice" in the growth-offset principle, and the "Board was entitled to inform its judgment by reference to it." 439 F.2d at 641.

introduction of charters, including OTCs, which raises questions concerning the need for, and the ability of the market to support, competitive scheduled service. We do not believe that National has demonstrated that a reopening of the record is justified.

To begin with, National has not shown that our estimate of traffic growth has been undermined by inflationary trends. Significantly, National has not specifically challenged our 7 percent annual growth estimate. In fact, National advocated employment of a 7.5 percent growth factor in connection with its recently filed motion to defer the proceedings pending further Board review of energy matters. Furthermore, National has not shown—or even attempted to show—that the operation of a limited number of charter flights by United (29 one-way flights in the last quarter of 1975 and 13 round-trip OTC flights in the first quarter of 1976) has adversely affected scheduled service or in any way undermines our estimate of traffic available for scheduled flights.

B. Pan American

We now consider Pan American's request to reopen the record on the issue of carrier selection. As a threshold matter, we point out that Western challenges the bona fides of Pan American's position. Western notes that Pan American has repeatedly argued that the record was adequate "as a basis for decision on all issues in this case," as long as it believed that it would be selected to compete with National, and, in fact, advanced this view less than two months before its instant pleadings. Western further argues that "only when Pan American learned that it was not to be selected did the record become 'stale'."

The Board shares Western's skepticism. First, the position now advanced by Pan American inexplicably

departs from the carrier's recent position on the same question. Thus, on January 7, 1976, National moved to defer further proceedings pending an investigation on energy conservation and efficiency questions. On January 23, 1976, Pan American filed an answer to National's motion, in which it unequivocally opposed National's request. Pan American's vigorous opposition to National's position is illustrated by the following passage from its answer:

> "National also uses this motion to reargue the issue of the staleness of the record evidence and need for reopening. That matter was thoroughly argued in the written pleadings and at the oral argument in this proceeding. The Board has broad discretion in this area and its precedents establish a strong policy disfavoring reopening the record, particularly in major route cases. The courts have consistently upheld broad agency discretion in this area. As Pan American has already demonstrated herein, the existing record is adequate as a basis for decision on all issues in this case, both economic and environmental."[8]

In submitting its motion and petition for further evidentiary hearings, Pan American has provided no explanation for its radical change of position. It points to no facts or circumstances that would cause a record, which it argued was perfectly adequate on January 23, 1976, to become inadequate less than two months later, and, frankly we perceive none.

Moreover, the persuasiveness of Pan American's arguments are further compromised by unexplained inconsistencies in its present position. Thus, for example, Pan American fails to explain why the record is stale

[8] Pan American's Answer dated January 23, 1976, to National's Motion to Defer Further Proceeding.

as to the conclusion that the Board did in fact make (*i.e.* that Western should be selected to compete with National in preference to Pan American and other applicants) but is not stale as to a different conclusion (*i.e.* that *both* Western and Pan American should not be permitted to compete with National).

Nevertheless, the Board has given full consideration to the merits of Pan American's request to reopen the record, and upon such reconsideration, we find ourselves unpersuaded by Pan American's contentions.

Pan American argues that the Board's selection of Western is based upon an unfair comparison of the applicants in that the Board arbitrarily selected facts and assumptions favoring Western while ignoring evidence in the record and changed circumstances which militate against Western's selection. In support of its claim Pan American maintains that the Board relied upon 1974 estimates of beyond traffic for Western, with no adjustment for intervening events, "while at the same time ripping apart Pan American' forecast because of changed circumstances, to reach a conclusion that Western is 'better' than Pan American." Pan American's contentions are erroneous and must be rejected.

To begin with, it appears that Pan American has misconstrued our findings with respect to Western's beyond segment potential. Specifically, the Board did not, as Pan American suggests, uncritically accept the administrative law judge's estimate in this regard. Rather the Board found that based upon evidence of record and the most recent officially noticeable data, Western should be able to flow at least 43,800 beyond passengers over the Miami-Los Angeles segment in the forecast year as estimated by Judge Dapper—and probably more. We do not believe that either Pan American or any other party has demonstrated error in

these findings. In fact, the only element of our forecast that is seriously challenged pertains to the extent that Western will be able to participate in four of its eight prospective beyond markets, *i.e.* Miami-Las Vegas/San Diego/San Francisco/Seattle. In this connection, Pan American, and a number of other disappointed parties, argue that the participation estimates for Western in these markets found reasonable by the administrative law judge, and accepted by the Board, are no longer credible in view of changed circumstances. We disagree with these contentions. For example, Judge Dapper found that Western should participate in about 8% of the Miami-San Francisco traffic in view of the single-plane frequencies operated by Delta and National, on the one hand, and Western's proposed connecting service on the other. By comparison, Delta and National operate single-plane service in that market today, and the premises underlying Judge Dapper's participation estimate otherwise remain essentially unchanged.[9] In our judgment similar considerations apply to the Miami-Las Vegas and Miami-San Diego markets.

Further, we believe that our estimate that Western will be able to carry about 7000 Miami-Seattle passengers in the forecast year, FY 1977, is sound, notwithstanding our willingness to consider applications of other carriers for improved authority in this market. Simply stated, assuming that requests for such improved authority are made and that the Board acts affirmatively on the request of a carrier other than Western, it is unlikely that the service proposal of the selected carrier(s) could be implemented in the forecast year. We appreciate that in the long run it is possible, but by no means certain that Western's Miami-Seattle traffic generating potential could be

[9] Compare O.A.G. June, 1973 with June, 1976.

affected by an award of comparable or superior authority to some other carrier. However, this situation is not uncommon or materially different from a host of other cases in which the Board has found that the immediate institution of new service is in the public interest, even though the benefits of that particular service may be ultimately reduced by subsequent Board action. Further, it is also significant that, in the long run, any potential loss of Miami-Seattle traffic will not have a significant bearing on Western's overall traffic generating ability, giving due consideration, *inter alia*, to predicable traffic growth in both the Miami-Los Angeles and the numerous secondary markets which can receive improved service from Western.

It also appears that Pan American has misconstrued our findings with respect to its traffic potential. In this connection, we note that Pan American has heretofore repeatedly argued in this proceeding—as a primary reason for its selection—that it enjoyed a massive reservoir of feed traffic that would permit it to offer more primary market frequencies and capacity than any other applicant. Pan American's theory of the case was accepted by the administrative law judge, who found that Pan American should be selected in large measure on the basis of the carrier's proposed frequencies and capacity. The purpose of the Board's analysis of Pan American beyond segment service proposal was to demonstrate that because of serious overstatements in its forecast of record and changed circumstances since the conclusion of hearing before the administrative law judge, Pan American could not realistically generate the feed traffic that it predicted and, therefore, could not operate three daily round trips in the primary market as it proposed to do. Pan American does not contest these findings. On the contrary, it now accuses the Board of not taking cognizance of its assertion that it would reduce its primary market schedules to accommodate actual traffic demand (*i.e.*, two daily round trips). The Board did not ignore Pan American's assertions. Rather, the Board found that, since Pan American could only match Western's proposed primary market frequencies, Western should be selected in preference to Pan American, in light of the overall superiority of Western's service proposal.

In our judgment, Pan American has presented nothing on reconsideration that would cause us to reach a different result in a reopened proceeding. Thus, in its petition it submits that if it were permitted to relitigate this case, it would show that it is prepared to use small jet aircraft and operate different primary market schedules. Pan American indicates that as a result of these changes it would, as compared to its service proposal of record, offer fewer daily nonstop flights (two daily round trips as compared to three), less capacity (294,992 seats as compared to 633,640) and would convenience fewer beyond segment passengers (*e.g.* 52,000 as compared to 163,100). In addition, Pan American does not allege that it would not continue to serve the Miami-Los Angeles market on flights also serving international destinations west of Los Angeles and east of Miami. In fact, to the extent that this important consideration can be discerned from Pan American's sketchy offer of proof, it appears that Pan American will not materially alter this aspect of its current service proposal. Thus, on the basis of Pan American's representations on reconsideration it appears that Pan American's new service proposal would be far less impressive *vis-a-vis* the other applicants, including Western, in terms of those factors which the administrative law judge found weighed in Pan American's favor, *i.e.* primary market frequencies, capacity and beyond segment traffic. On the other hand,

Pan American has not demonstrated that the major infirmities of its existing proposal, including an attempt to service the local market as part of vast international journeys, would be cured. Thus, we see no public purpose to be served by the relitigation of this major route proceeding.

Next, Pan American argues that Western's primary market service proposal should not be a significant carrier selection factor. We disagree. All applicants in Board route proceeding rely as grounds for their selection upon claimed superior service which they will provide if selected, and Pan American's suggestion that the Board has a decisional rule against giving weight to such factors is frivolous.[10] In fact, prior to its motion for rehearing, Pan American's position was that it should be selected in large part on the grounds that its proposed primary market schedules meshed neatly with its international schedules thereby permitting Pan American to offer more significant public benefits that any other applicant.

Moreover, Western's relatively simple service proposal (two daily round trips feeding into its extensive west coast system) continues to be based upon reasonable economic assumptions. In these circumstances, we are not persuaded by Pan American's speculation that Western's proposal is no longer reliable in view of the passage of time. Indeed, Pan American has not convincingly identified any consideration since the conclusion of the evidentiary hearing which demonstrates that Western will neither operate its service as proposed nor otherwise tailor its services to the needs of the Miami-Los Angeles market. It is simply not enough for Pan American to suggest that because its service proposal is now demonstrably unworkable, the Board

[10] See, for example, our discussion at p. 19 of the opinion.

should disregard the service proposal of the other applicants.

In addition, Pan American claims that the Board "disqualified" it on the grounds that the carrier was unable to perform reliable and effective service in the Miami-Los Angeles market, and that such "disqualification" is without evidentiary support and plainly wrong. Pan American's accusations are unfounded and ignore critical findings that the Board did in fact make. The Board did not "disqualify" Pan American, or any other applicant, from receiving a full and fair consideration of its proposal. Rather, the Board selected Western in preference to Pan American on a number of substantive grounds as stated at length in our opinion.[11] Our specific reasons need not be repeated here. Suffice to note that after carefully weighing the merits of each carrier's presentation the Board found that Western will be able to provide service that is both more responsive to the needs of the local market than Pan American and better able to provide National with a long-overdue competitive stimulus. In view of the importance that we attach to these considerations in the circumstances of this case, we continue to believe that Western's advantages outweigh Pan American's, and, consequently, that Western is the better choice. As discussed, Pan American has presented nothing that would cause us to reach a different result.

Pan American also incorrectly assumes that the Board ignored certain factors which, Pan American argues, favor its selection. However, the factors referred to by Pan American have been considered by the Board and have been found to be, in the aggregate, of insufficient decisional importance to outweigh the considerations favoring Western. For example, the Board

[11] See Opinion at pp. 17-26.

did not ignore Pan American's potential for generating more beyond-segment passengers over the Miami-Los Angeles segment than Western. On the contrary, the Board made detailed findings on this issue, including (1) that Pan American's ostensible advantage in this respect did not translate into primary market services as good as those proposed by Western, and (2) that, in fact, that Pan American's beyond terminal services impeded the carrier's ability to serve the local market as effectively as Western. Indeed, while the Chairman and Vice Chairman urged that Pan American be added as a third carrier to the market, they expressly stated that Pan American's potential for conveniencing more international passengers than any other applicant did not "justify the selection of Pan American as National's principal competitor in preference to Western in view of Western's superior ability to meet the needs of domestic traffic."[12] Needless to say, all four participating Members of the Board share this view.

Similarly, we considered, as part of our overall deliberations, Pan American's contentions, and the administrative law judge's findings, on Pan American's alleged need for profitable new route opportunities. We recognize that from a public interest standpoint these matters are important, given the major role that Pan American occupies in the structure of air transportation world wide. However, we found that in the circumstances of this case, these factors are outweighed by

[12] Separate statement of Chairman Robson and Vice Chairman O'Melia, p. 2.

[13] Pan American avers that the Board's rationale in this case means that Pan American will never be awarded a domestic route. Pan American's contention is without merit. Nothing in our decision is intended to prejudge Pan American's application in any other proceeding. Any route extension requested or other formal applications to acquire domestic authority which the carrier may submit will be evaluated in light of the facts presented in each case, including the comparative capabilities of other applicants.

more important public interest considerations favoring Western, including those related to Western's ability to provide superior service, and more effective competition, in the local Miami-Los Angeles market. Pan American has presented nothing on reconsideration that would cause us to alter our conclusion.

III. Petitions for Reconsideration of Western's Selection

A. American

American asserts that it should be selected for the Miami-Los Angeles route award in preference to Western. It argues that selection of American would result in more public benefits and less diversion from National, and that American needs the strengthening the route can provide more than Western. American also maintains, as an additional reason for its selection, that it has the greatest historic interest in the route.

We will deny American's petition. We found that the selection of Western over American is in the public interest on a number of substantial grounds as detailed in our opinion, including Western's overall advantage in service benefits and ability to develop the Miami-Los Angeles market, and is consistent with our policy of strengthening the smaller carriers in the industry. American has brought to our attention no matters which demonstrate error in our earlier determination.

First, American maintains that it will be able to provide more public benefits since it will offer three daily round trips in the Miami-Los Angeles market, as compared to Western's initial offering of two daily round trips.[14] However, American's contention that it will offer more public benefits than Western is simply not supported by the facts of record. As reflected at

[14] American proposes to offer two round trips with B-707 equipment, and the third frequency with DC-10 equipment. By comparison Western will provide two daily round trips with DC-10 aircraft.

pp. 20-21 of our opinion, the evidence in this case establishes that a total of four daily round trips—two each by National and Western—represents fully adequate competitive service for the local market in the immediate future. Consequently, we do not share American's contention that its fifth round trip will result in significant public benefits. Furthermore, to the extent that American's extra frequencies result in some additional benefits, we continue to believe that these are matched by other primary market considerations favoring Western, including Western's advantage in providing all wide-bodied schedules in a market unique suited for such service, and the negative factor that American's initial frequencies would have a greater adverse impact upon National in terms of diverting revenues and lowering its load factors. Moreover, it is evident that American's offer to provide more primary market frequencies immediate is an essentially transitory consideration given the fact that in the long run Western's pool of beyond-segment traffic support will enable it to surpass the other applicants in competing with National and servicing the needs of the market. In all these circumstances, American's proposed extra round trip can hardly be construed as a decisionally significant basis for selection of it in preference to Western. Accordingly, Western's decisive advantage in conveniencing the traveling public in secondary markets is all but dispositive of American's application in the circumstances of this case.

Significantly, American does not dispute the Board's findings that Western will convenience far more beyond-segment passengers than American, and that those passengers will permit Western to offer the optimum level of service in the Miami-Los Angeles market. Rather, American argues that Western's beyond-segment support is a negative factor in the circum-

stances of this case because it would "undercut" the existing services of other carriers. American's contention is not persuasive. To a large extent, American merely states the obvious, namely that the added convenience provided by Western's services in secondary markets may, to varying degrees, divert traffic from other carriers. However, there has been no showing that any such carrier will be significantly harmed by the selection of Western. Indeed, the impact on American itself will be *de minimis*, especially since it does not presently serve Miami. Further, as reflected below, we continue to believe that selection of American will result in more diversion and more "undercutting" of National's services than resulting from selection of Western. In any case, the Board has balanced the benefits of Western's services against potential harm to other carriers, and has concluded that Western's advantage in providing the traveling public with service benefits is not vitiated by the diversionary impact of its proposal. American has failed to demonstrate error in our conclusion.

Next, American argues that the Board has erred in determining that it will divert more revenues from National than Western. American acknowledges that it will divert approximately $1.5 million more revenues from National in the primary market than Western. However, it argues that Western will divert more overall revenues from National because Western's diversion from National in secondary markets will exceed American's by about $3 million. Again, we are not persuaded by American's contention.

To begin with, it appears that American has understated the amount of revenue that it will divert from National *vis-a-vis* Western by, for example, assuming that both carriers will divert an equal amount of revenue from National in the Miami-San Diego market,

notwithstanding the fact that American's traffic generating potential therein is greater than Western's due to its proposed single-plane, as compared to Western's connecting, service.[15] Moreover, it appears that American has significantly overstated Western's diversion from National by assuming that Western's participation in National's secondary markets will eliminate National entirely from all such markets, and, consequently, divert all traffic which National has historically carried. This contention is clearly contrary to the facts of record.

In sum, since American acknowledges that it will divert substantially more revenues from National than Western in the primary market, and since American's approach to beyond-segment diversion is unreasonable on its face, we cannot find that American has demonstrated error in our determination that it will divert more revenue from National than Western. Thus, to the extent that diversion from National is an element in carrier selection, that consideration continues to favor Western over American.

Finally, American maintains that carrier strengthening factors favor it over Western because Western has achieved greater profits in recent years and because the Board has previously relied upon the relative profitability of competing applicants as a carrier selection factor in other cases. We do not agree with American's position.

Initially, it is important to bear in mind that since a wide variety of factors enter into every public convenience and necessity determination, a factor which may be important in one factual setting may be entitled to less decisional significance in another. For example,

[15] Indeed we note that American estimated that it would carry approximately 20,000 Miami-San Diego passengers in the forecast year, while Western predicted only about 8200.

while it is true that the Board has focused on the relative profitability of competing applicants in some cases, it is equally true that it has given greater weight to route strengthening considerations in others. In the instant case the Board found that it strengthening one of the small trunklines in the industry was a factor in Western's favor and we cannot find that American has demonstrated error in our determination. There can be little question that the public interest in allowing smaller carriers to grow at a faster rate than larger carriers so as to promote and create a more viable air transportation system will be enhanced by selecting Western in preference to American. American is, of course, the larger of the two carriers by any reasonable measure of comparison. On the other hand, we cannot find that the overall public interest considerations favoring a new route award to American are as compelling. Thus, for example, notwithstanding the fact that Western may have achieved greater profits in recent years, American is a financially strong and healthy carrier, and has not alleged that this situation will change materially in the absence of the Miami-Los Angeles route. In addition, American has been recently granted major new route opportunities as a result of the Board's decision in the *Reopened Service to Omaha and Des Moines Case*, Order 75-9-19, dated September 8, 1975.

B. Continental

Continental argues, in essence, that it and Western stand on a substantially equal footing in terms of service benefits, particularly because Western's beyond benefits have no decisional significance in the circumstances of this case. Continental further asserts that the Board did not adequately consider carrier selection factors militating in favor of Continental including its economy fare proposal, proven "competitve capability

and initiative," and its greater need for route strengthening. We find Continental's arguments unpersuasive and will therefore deny its petition.

It is significant to point out that Continental does not expressly challenge Western's ability to flow more beyond-segment passengers over the Miami-Los Angeles route than Continental, but argues that this factor is meaningless, both as a matter of law and fact. Continental's legal arguments are disposed of *infra*. Here we focus on Continental's contention that Western's beyond benefits are decisionally insignificant because, Continental asserts, they are largely duplicative of, and represent no real improvement over, the services provided by other carriers. We disagree.

The qualitative benefits resulting from Western's services are discussed in our earlier opinion and that discussion need not be repeated here. Suffice to note, Western's single-plane and connecting services represent direct and significant benefits to the users of air transportation, as decisively illustrated by our finding that over 40,000 beyond passengers in the forecast year will use Western's services. Moreover, as discussed in connection with our response to American's petition for reconsideration, it is both evident and significant that in the long run Western's superior beyond-segment traffic support will insure its ability to provide a greater quantum of economic service in the Miami-Los Angeles market. This is a decisional factor which Continental has championed in other cases. In short, we continue to believe that Western has a significant advantage over Continental in terms of the service benefits they are likely to offer the traveling public and that this consideration is a compelling reason for selecting Western in the circumstances of this case.

Continental also argues that the Board erroneously determined that Western, rather than Continental, would be better able to develop the Miami-Los Angeles market. Continental attributes the Board's error in significant part to a "failure to consider Continental's identity in both terminals while placing decisive weight on Western's identity at Los Angeles." The short answer to Continental's arguments is that the Board's determination that Western was in the best position to develop the market did not turn exclusively, as Continental states, on Western's "identity" at Los Angeles, but rather on a number of factors which we found to be crucial in light of the special characteristics of the Miami-Los Angeles market. These factors are detailed in our original opinion and include, in addition to Western's identity at Los Angeles, Western's extensive west coast system, its superior ability to flow beyond segment traffic over the route, and its preeminent traffic generating position at Los Angeles.[16] There can be little question that Western's advantages in these respects are extremely important—especially since two-thirds of the traffic in the Miami-Los Angeles market originates at Los Angeles and other points served by Western, and National's strength rests principally at Miami. In these circumstances, we continue to believe that the factors cited by Continental in support of its contention that it will be better able to develop the Miami-Los Angeles market are not of sufficient decisional import to outweigh those favoring Western. Moreover, Continental's claimed advantages do not in any event withstand analysis. For example, while it is true that Western has no "identity" at Miami, it is equally true that Continental's identity at that point is of recent vintage and is relatively limited. Also, identity is not necessarily essential to success, as Con-

[16] In 1974, for example, Western enplaned nearly twice as many passengers at Los Angeles as Continental.

tinental has recently argued to the Board in the *Service to Saipan* case. Similarly, we note that Continental advances its familiar argument that it is a proven, effective competitor while its adversary, this time Western, is not. While we have no doubt of Continental's general effectiveness as a competitor, we likewise have no doubt that Western's advantages *vis-a-vis* Continental in the market here at issue (including, notably, Western's route structure) will permit Western to be a highly capable competitor to National.[17]

Next Continental argues that although the Board expressly addressed its economy fare proposal, the Board failed to give that proposal adequate consideration. Our specific findings on this issue are set out at p. 16 of our opinion and need not be repeated here. Continental's complaint is nothing more than disappointment with our earlier determination that its advantage in this area of carrier selection is outweighed by Western's advantages in services benefits and overall ability to develop the Miami-Los Angeles market.

Finally, Continental argues that the Board erred in not finding that it has a far greater need for route strengthening, and in not attaching significant weight to this consideration. It asserts that changed circumstances since the conclusion of the evidentiary hearings (including certain recent route awards to Western) demonstrate that it has a greater need for new routes than Western, and points to certain carrier-strengthening criteria in support of its position. After considering Continental's contentions in light of pertinent

[17] We note, in passing, that Continental's vigor as a competitor was insufficient to overcome deficiencies in its route structure when the carrier attempted to mount a competitive Dallas-Los Angeles operation.

evidence of record and other officially noticeable matters, we remain convinced that our findings with respect to the carrier's relative need for strengthening are sound, and that we attached appropriate weight to this issue in the circumstances of this proceeding. In this connection, it is significant to point out that since the filing of Continental's petition for reconsideration (and unrelated to that filing), the carrier has itself received a new route award in the *Service to San Diego* case, and, in addition, is the Board's choice for new authority that would extend its system to Japan.

C. TWA

TWA claims that it should be selected in preference to Western because it has a greater need for the Miami-Los Angeles route than Western. It argues that the new route would help offset recent heavy economic losses, improve its competitive position at Miami, and correct seasonal deficiences in its present system operations. TWA also argues that it has been increasingly subjected to competition without receiving compensating benefits from new route awards. We shall also deny TWA's petition.

TWA's claim that it should be selected in preference to Western because of its greater need for an award in this case is basically a restatement of its previous arguments to the Board. We find TWA's position no more persuasive now than when we first considered it. Thus, even if we accept TWA's contention that it needs the route more than Western at face value, we cannot find that this consideration outweighs the factors favoring the selecetion of Western or TWA. Other public interest considerations, including Western's superior ability to convenience the traveling public, are more important in the circumstances of this case.

IV. Other Requests for Reconsideration

Continental and Pan American attack, from opposite directions, the Board's reliance on beyond-segment services as a relevant carrier selection factor. Continental argues that the Board cannot find Western's beyond benefits controlling when it had earlier held (*i.e.*, in its 1969 decision) that such factor was not important in this particular market. Pan American contends that the Board has emphasized new beyond services in case after case, that Pan American offers the most beyond service, and that what has been considered important in previous cases may not be disregarded in favor of Western's mixed proposal of turnaround and beyond services.

We perceive no error in our approach to beyond services in this proceeding. In considering whether or not the public convenience and necessity require the grant of one application in preference to another, the Board weights all relevant factors in light of the evidence before it in a particular case and no single factor need be decisive in all cases. *United Air Lines v. CAB*, 371 F.2d 221 (7th Cir. 1967, *Memphis/Huntsville/Birmingham-Los Angeles Service Investigation*, 51 C.A.B. 648, 650-51 (1969). In the instant case we concluded that Western would better respond to the overall needs of the Miami-Los Angeles market notwithstanding Pan American's potential for greater beyond benefits. Such an approach has been employed by the Board in the past and, if supported by the evidence, is perfectly appropriate. See, by way of example, the Board's award of Atlanta-Nashville authority to Southern Airways in the *Southern Airways, Inc. Route Realignment Investigation (New Route Authority Phase)*, Order 73-2-90. Februarv 23, 1973, pp. 9-12. By the same token, the fact that the Board seven years ago and on a different record declined to accord significant weight

to beyond benefits when it selected Northeast Airlines as the Miami-Los Angeles carrier fundamentally on carrier strengthening grounds does not preclude reliance on beyond benefits as one of several factors on the basis of the current record. Compare, by way of example, the Board's selection of Continental instead of Delta for the Houston-Miami award in the *Southern Tier Competitive Nonstop Investigation (Houston-Miami Phase), Order* 73-2-89, pp. 5-13.

In like fashion, Continental and Pan American challenge our selection of Western here as inconsistent with our recent decision to select Western as the Honolulu-Vancouver carrier. Fundamentally, the petitions argue that we have selected Western in the instant case despite its lack of a Miami station and its need to obtain a new DC-10 aircraft although we refused to select Hawaiian Airlines for the Honolulu-Vancouver route, at least in part because it would have to open a new station at Vancouver and would need to obtain a new equipment type, namely long-range aircraft. We believe that the factual circumstances involved in the two cases, including, notably, the market characteristics, are readily distinguishable. As the Board stated in distinguishing these two cases in its opinion in the *Honolulu-Vancouver Route Proceeding;* Order 76-2-1:

> ". . . [W]e do not believe that the [Honolulu-Vancouver] route should be awarded to one of the two applicants which would be required to establish a new station at Vancouver. In view of the highly seasonal traffic pattern in the market, including the likelihood that available traffic will be insufficient in the first year to support a daily pattern of service in the summer period, we believe that the establishment of a new station by either of these carriers would not represent a prudent allocation of resources. On the contrary, it makes more

sense to allow one of the existing carriers the increased station utilization which will result from the addition of new Honolulu-Vancouver authority. Similarly, we believe that the traveling public will be better served by giving a carrier with stations at both cities the operating flexibility which will result from the integration of the new authority into an existing system.[6]

[6] Western, for example, which proposes DC-10 service and already operates such service to both Honolulu and Vancouver, plans to fully integrate the new service into its existing system. The carrier plans to operate its aircraft as part of a routing which also includes San Francisco and projects a layover of only about an hour at Honolulu and Vancouver. See WA-201. United would also connect its operation with other scheduled services at Vancouver. UA-T-1. Hawaiian, by way of comparison, plans to obtain two new aircraft for use on the route which could not be used elsewhere on its system. During the peak season, when both aircraft would be in use, no backup equipment would be readily available. See R.D. 31-32. Northwest would rotate its equipment and crews on and off the route as part of its Seattle-Hawaii operation but would overnight the aircraft at Vancouver. NW-200/201. . . ."

Braniff, Eastern, and Northwest urge the Board to stay or preclude the operation of one-stop service by Western in the Miami-Seattle market. They argue, in essence, that permitting Western to provide such single-plane service would be unfair to carriers now holding restricted authority in the market, would contravene Board policy favoring the lifting of such restrictions before a new carirer is introduced, and would divert

revenues.[18] In our original opinion, we pointed out why the reasons for the earlier restrictions no longer obtained. Furthermore, we observed that one-stop service would add to the convenience of the traveling public without adversely affecting any other carrier but that, in the interest of fairness, we would be receptive to applications by carriers whose Miami-Portland/Seattle authority has been restricted and that, in any future proceeding, we would not allow Western to claim any priority of rights on the basis of its existing one-stop authority. Significantly, none of the objecting parties emphasizes the improved service to the traveling public likely to result from Western's operations. Such servive, however, is a prinicpal focus of attention. The representations of the objectors that we protect their existing or potential positions do not convince us that their approach—which would preclude improved service—is either required as a matter of law or represents a preferable balance of all the public interest factors.[19] In the instant case, allowing Western to provide one-stop service will in no way preclude the subsequent award of nonstop authority as a matter of economic fact or give Western an advantage over other applicants by reason of incumbency. See Eastern-Piedmont Route Transfer, Orders 72-3-18, March 8, 1972, and

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[18] None of the parties attempts to quantify the likely diversion or suggests that any diversion which might occur would seriously threaten their ability to perform their certificate obligations. Northwest contends that there is no need for Western's service in view of the small size of the market (only 22,790 passengers during 1974) and the availability of existing single-plane service. Such small size, of course, also argues against the necessity of a restriction as a means of protecting existing participants in the market from substantial-revenue diversion.

[19] Although Northwest argues that the traffic carried on its existing two-step flights via Chicago "is essential to maintain the excellent service now provided by Northwest . . . ," the carrier (like Braniff and Eastern) nonetheless seeks to provide nonstop Seattle-Miami service.

72-11-2, November 7, 1972, aff'd sub. nom *Louisville and Jefferson County Air Board v. CAB*, 494 F.2d 1156 (D.C. Cir. 1974). Consequently, we see no basis for depriving the public of service pending the outcome of other proceedings which may be instituted.

Finally, Pan American urges the Board, at a minimum, to authorize its entry into the market as a third carrier as recommended by the Chairman and Vice Chairman. The Board has considered this request and, being equally divided (Member Johnson not participating), this aspect of Pan American's petition for reconsideration fails for want of a majority.

ACCORDINGLY, IT IS ORDERED THAT: All requests for reconsideration or stay of the Board's decision and all requests for a reopening or remand of the investigation be and and they hereby are denied.

By the Civil Areonautics Board:

PHYLLIS T. KAYLOR
Acting Secretary

(SEAL)

ROBSON, CHAIRMAN, AND O'MELIA, VICE CHAIRMAN, CONCURRED AND FILED THE ATTACHED JOINT SEPARATE STATEMENT. JOHNSON, MEMBER, FILED THE ATTACHED STATEMENT.

SEPARATE STATEMENT OF CHAIRMAN ROBSON AND VICE CHAIRMAN O'MELLA

It is our judgment that the grant of permissive authority to Pan American would be beneficial to both it and the traveling public; that neither National nor

Western would be seriously injured; and that if contrary to expectations, Pan American realized extended losses on the route, the carrier could discontinue service because the authority granted would be permissive. The instant case thus gives the Board a golden opportunity to experiment in a single market by granting Pan American permissive authority, on a test basis for three years, to operate as the third carrier in the Miami-Los Angeles market. We note from Pan American's brief on reconsideration that it is ready, willing, and able to go into the Miami-Los Angeles market on these conditions.

Accordingly, for the reasons given in our separate statement in Order 76-3-93 we would authorize Pan American as the third carrier in this market on a permissive basis.

/s/ RICHARD J. O'MELIA

/s/ JOHN E. ROBSON

SEPARATE STATEMENT OF JOHNSON, MEMBER

I have consistently declined to participate in reconsiderations of Board decisions made before I became a Member of the Board. I do so in this case.

This policy is based on longstanding Board practice[1] and general considerations of propriety, fairness, and the need to bring an end to administrative procedures.[2] I see no useful purpose in delaying the proceedings to qualify myself to deal with matters on which, as the

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[1] *In the matter of the Application of Continental Air Lines and Pioneer Airlines*, Order E-9049, March 28, 1955.

[2] *Large Irregular Air Carrier Investigation*, 28 C.A.B. 224, 488-89 (1959); *Southern Tier Competitive Nonstop Investigation (Houston-Miami Phase)*, Order 73-5-110, May 23, 1973.

Board's opinion demonstrates, all four of my colleagues agree. Therefore, I express no view on the need for competitive service, the selection of a carrier for first competitive service, or the issue of reopening the record to receive fresh evidence.

For similar reasons, I do not express any view regarding the one issue on which my colleagues are equally divided—whether Pan American may operate as the third carrier in the market on a trial basis. Only if the petitions for reconsideration brought out some crucial factual error which would compel a different result on this specific issue might I have a duty to participate in reconsideration[3] notwithstanding the general Board practice and policy of new Members not participating in reconsiderations. Here, I find no such showing on this specific issue,[4] and therefore I believe I must refrain from expressing any view on it.

/s/ R. TENNEY JOHNSON

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[3] *Braniff Airways v. CAB*, 379 F.2d 453 (D.C. Cir. 1967).

[4] Pan American's new showing that its load factor under the Board's projections would be 48 percent rather than 35 percent if it utilized 747 SP equipment rather than 747's does not upset the primary basis for the majority's judgment on this issue, which I take to be that the international beyond benefits of Pan American service do not offset its adverse impact on the ability of National and Western to serve the local market now and in the future, nor is it critical to the differing judgment of the Chairman and Vice Chairman on the same issue.

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1241 September Term, 1976

Delta Air Lines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Western Air Lines, Inc.
Northwest Airlines, Inc.
Pan American World Airways, Inc.,
Intervenors

United States Court of Appeals
for the District of Columbia Circuit
FILED AUG 2 1977
GEORGE A. FISHER
Clerk

NO. 76-1309

Pan American World Airways, Inc,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Northwest Airlines, Inc.,
Intervenors

NO. 76-1429

National Airlines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Western Airlines. Inc.
Pan American World Airways, Inc.
Northwest Airlines, Inc.,
Intervenors

App. D-2

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1602 September Term, 19 76

American Airlines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Pan American World Airways, Inc.
Western Air Lines, Inc.,
Intervenors

BEFORE: McGowan, Leventhal, Robb; Circuit Judges

O R D E R

It is ORDERED by the Court, sua sponte, that this Court's opinion of June 23, 1977 is amended as follows:

1) On page 4, line 4, of the first full paragraph; "Case" is changed to "Record."

2) On page 42, line 10; "Case " is changed to "Record."

Per Curiam

APPENDIX E

App. E-1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1241 September Term, 1976

Delta Air Lines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Western Air Lines, Inc.
Northwest Airlines, Inc.
Pan American World Airways, Inc.,
Intervenors

United States Court of Appeals
for the District of Columbia Circuit
FILED AUG 2 1977
GEORGE A. FISHER
CLERK

and consolidated case nos. 76-1309, 76-1429, 76-1602.

BEFORE: McGowan, Leventhal and Robb, Circuit Judges

ORDER

It is ORDERED by the Court, sua sponte, that this Court's judgement of June 23, 1977 is amended by deleting the word "Cases" from the first line of the second paragraph and substituting therefore the word "Records."

Per Curiam

APPENDIX F

App. F-1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1241 September Term, 19 76

Delta Air Lines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Western Air Lines, Inc.
Northwest Airlines, Inc.
Pan American World Airways, Inc.,
Intervenors

NO. 76-1309

Pan American World Airways, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Northwest Airlines, Inc.,
Intervenor

NO. 76-1429

National Airlines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Western Airlines, Inc.
Pan American World Airways, Inc.
Northwest Airlines, Inc.,
Intervenors

United States Court of Appeals
for the District of Columbia Circuit
FILED AUG 2 1977
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CLERK

App. F-2

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1602 September Term, 19 76

American Airlines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Pan American World Airways, Inc.
Western Air Lines, Inc.,
Intervenors

BEFORE: McGowan, Leventhal, Robb, Circuit Judges

O R D E R

On consideration of petitioner's petition for rehearing, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

APPENDIX G

App. G-1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1241 **September Term, 19 7c**

Delta Air Lines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Western Air Lines, Inc.
Northwest Airlines, Inc.
Pan American World Airways, Inc.,
Intervenors

NO. 76-1309

Pan American World Airways, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Northwest Airlines, Inc.,
Intervenors

NO. 76-1429

National Airlines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Western Air Lines, Inc.
Pan American World Airways, Inc.
Northwest Airlines, Inc.,
Intervenors

United States Court of Appeals
for the District of Columbia Circuit
FILED AUG 2 1977
GEORGE A. FISHER
Clerk

App. G-2

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1602 September Term, 19 76

American Airlines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Pan American World Airways, Inc.
Western Air Lines, Inc.,
Intervenors

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm Leventhal, Robinson, MacKinnon, Robb and Wilkey; Circuit Judges

O R D E R

On consideration of petitioner's petition for rehearing en banc, and no judge of the Court in regular active service having called for a vote thereon, it is

ORDERED by the Court en banc, that the aforesaid petition is denied.

Per Curiam

APPENDIX H

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1241 September Term, 19 76

Delta Air Lines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Western Air Lines, Inc., et al.,
Intervenors

United States Court of Appeals
for the District of Columbia Circuit
FILED AUG 2 1977
GEORGE A. FISHER
CLERK

BEFORE: McGowan, Leventhal and Robb, Circuit Judges

ORDER

Petitioner National Airlines has filed a petition for stay of mandate pending disposition of suggestion for rehearing en banc, or for stay of mandate pending application for certiorari. An opposition has been filed by Western Air Lines, and by the Civil Aeronautics Board, respondent, which opposes a further stay of mandate, in the event rehearing is denied, because the Board has accepted this Court's decision remanding these records "for adversarial exploration of the recent developments considered by the Board in reaching its decision to prefer Western over Pan American." The Board advises that it wishes to conduct the remand proceedings as promptly as practicable, to avoid prolonging the uncertainty of route award in a matter that has already lasted for nearly ten years.

The Court is of the view that in all probability denial of a stay will not harm National since the Court's order, even if not stayed, does not remove Western's operating authority during the pendency of the remand proceeding, and thus National will not, by the denial of the stay, recapture the monopoly position it enjoyed prior to the issuance of the Board's order.

It is also desirable that the proceedings on remand be carried on as expeditiously as possible, as the Board represents its purpose to do.

App. H-2

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1241 September Term, 1976

and consolidated case Nos. 76-1309 76-1429 76-1602

On consideration of the foregoing, it is

ORDERED by the Court that the aforesaid motion for stay of mandate is denied.

Per Curiam

APPENDIX I

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1241 SEPTEMBER Term, 19 76

Delta Air Lines, Inc.,
Petitioner

Civil Aeronautics Board,
Respondent

Western Air Lines, Inc
Northwest Airlines, Inc.
Pan American World Airways, Inc.,
Intervenors

United States Court of Appeals
for the District of Columbia Circuit
FILED JUN 23 1977
GEORGE A. FISHER
CLERK

No. 76-1309

Pan American World Airways, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Western Air Lines, Inc.
Northwest Airlines, Inc.,
Intervenors

No. 76-1429

National Airlines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Western Air Lines, Inc.
Pan American World Airways, Inc.
Northwest Airlines, Inc.,
Intervenors

No. 76-1602

American Airlines, Inc.,
Petitioner

v.

Civil Aeronautics Board,
Respondent

Pan American World Airways, Inc.
Western Air Lines, Inc.,
Intervenors

PETITIONS FOR REVIEW OF ORDER OF THE CIVIL AERONAUTICS BOARD

Before: McGOWAN, LEVENTHAL and ROBB, Circuit Judges.

J U D G M E N T

These cases came on to be heard on the record from the Civil Aeronautics Board, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that these cases are remanded to the Civil Aeronautics Board for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

George A. Fisher,
Clerk

Dated: June 23, 1977
Opinion filed by Circuit Judge McGowan.

APPENDIX J

Section 401(d)(2) of the Federal Aviation Act, 49 U.S.C. § 1371(d)(2):

> In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder."

Section 416 of the Federal Aviation Act, 49 U.S.C. § 1386:

> (a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this subchapter, to be observed by each such class or group, as the Board finds necessary in the public interest.
>
> (b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this subchapter or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of

such air carrier or class of air carriers and is not in the public interest.

(2) The Board shall not exempt any air carrier from any provision of subsection (k) of section 1371 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Board finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided*, That nothing in this subsection shall be deemed to authorize the Board to exempt any air carrier from any requirement of this subchapter, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.

Section 1006 of the Federal Aviation Act, 49 U.S.C. § 1486:

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not

so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

Section 10(e)(2)(D) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(D):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

hold unlawful and set aside agency action, findings, and conclusions found to be without observance of procedure required by law.